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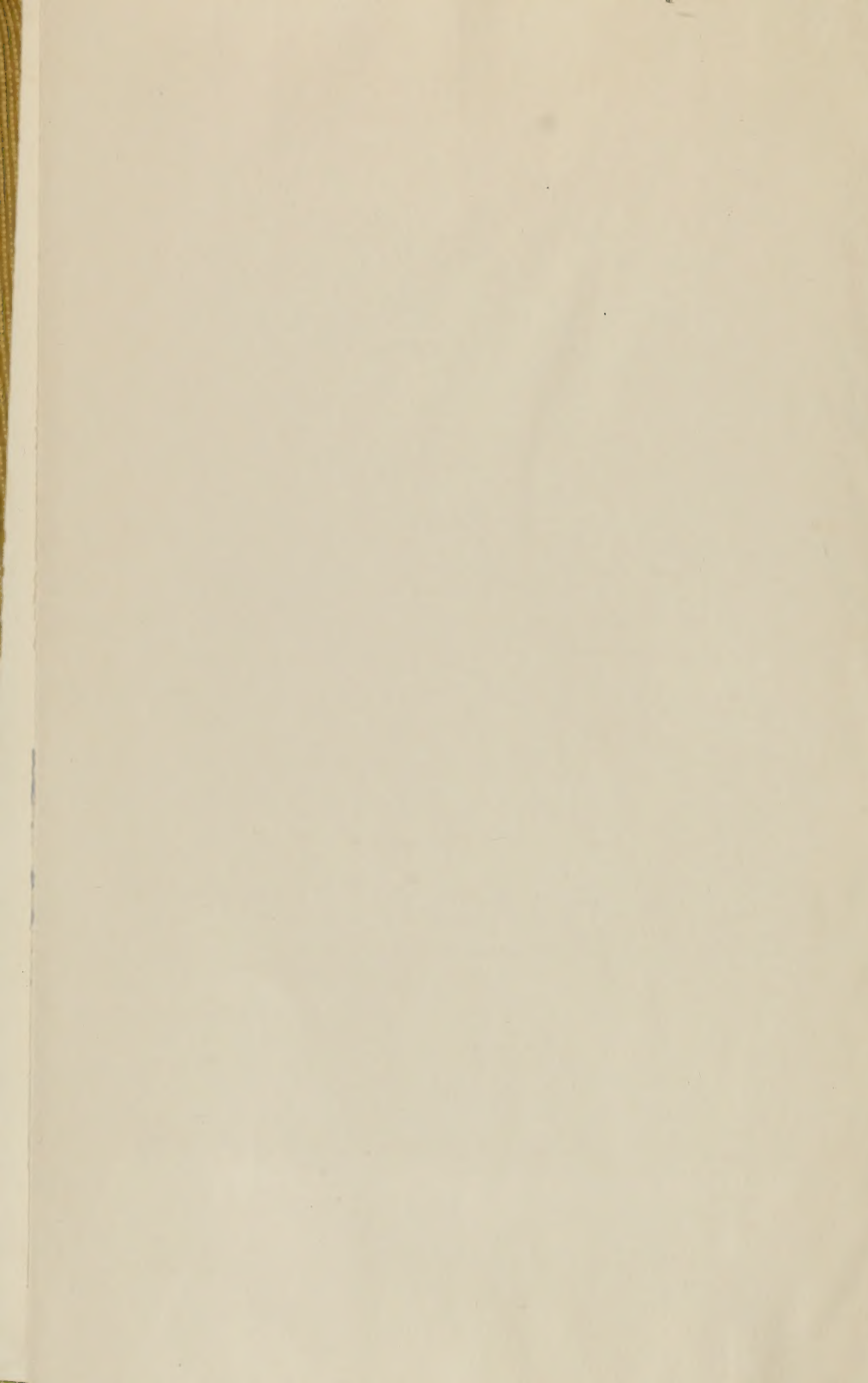
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1083

No. 2926

United States 1083
Circuit Court of Appeals

For the Ninth Circuit.

CHEW HOY QUONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at
the Port of San Francisco, California,

Appellee.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and on
Behalf of His Wife, QUOK SHEE.

Transcript of Record.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

Filed

FEB 15 1917

F. D. Monckton,
Clerk.

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Circuit Court of Appeals
For the Ninth Circuit.

CHEW HOY QUONG,

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EDWARD WHITE, as Commissioner of Immigration at
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Behalf of His Wife, QUOK SHEE.

Transcript of Record.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

THE STATE

OF NEW YORK

IN SENATE

JANUARY 1881

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

APRIL 1880

ALBANY: PUBLISHED BY THE STATE

PRINTING OFFICE, 1881

THE STATE OF NEW YORK

IN SENATE

JANUARY 1881

REPORT

OF THE

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For the Petitioner:

DION R. HOLM, Esq., and ROY A. BRON-
SON, Esq., both of San Francisco, Cali-
fornia.

For the Respondent:

UNITED STATES ATTORNEY, San Fran-
cisco, California.

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Praeipice for Transcript of Record.

To the Clerk of said Court:

Sir: Please issue certified copies of the following
pleadings, etc.

1. Petition for Writ of Habeas Corpus with first
page of Amendments.
2. Order therein.
3. Demurrers.
4. Order Sustaining Demurrer and Denying Peti-
tion.
5. Notice of Appeal.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignment of Errors.
9. Stipulation as to Exhibits and Order.

10. Citation.

11. Praeipce for Appeal and all minute orders of court, except those of postponement.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Appellant.

Received copy of the within on December 27, 1916.

JNO. W. PRESTON,

Attorney for Respondent.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Amendment to Petition for a Writ of Habeas Corpus.

Comes now your petitioner, Chew Hoy Quong, and asks leave of the Court to file this document as an amendment to his petition for a Writ of Habeas Corpus heretofore filed and respectfully alleges:

That on the 24th day of November, 1916, your petitioner caused to be filed a petition for a Writ of Habeas Corpus and that your petitioner employed counsel for the purposes of applying for said writ on the 23d day of November, 1916. That it was im-

*Page-number appearing at foot of page of original certified Transcript of Record.

possible to prepare and have copied the testimony hereunto attached at the time of filing the petition. That the attorneys applying for the writ did not represent your petitioner during the proceedings at the Immigration Station and that the testimony hereunto attached marked Exhibit "A" did not come into the hands of the attorneys for petitioner until the 23d day of November, 1916.

WHEREFORE, your petitioner prays that he be allowed to file this document as an amendment to his original petition and that the testimony hereunto attached marked Exhibit "A" may be considered as part of the original petition for a Writ of Habeas Corpus.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner. [2]

Exhibit "A" attached hereto omitted in accordance with order dated December 27, 1916. [3]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Petition for Writ of Habeas Corpus.

The petition of Chew Hoy Quong respectfully
shows:

I.

That your petitioner is a person of Chinese extrac-

tion, with the standing of a merchant within the meaning of section 2 of the Act of November 3d, 1893 (28 Stat. L. 7), entitled "An Act to amend an act entitled 'an Act to prohibit the coming of Chinese persons into the United States,' approved May 5th, 1892," and as such is duly authorized to be and remain in the United States and to be accorded all the rights, privileges, immunities and exemptions which are accorded the citizens of the most favored nation.

II.

That the said Quok Shee, also known as Quok Sun Moy, the detained person and wife of petitioner on whose behalf this petition is made and as such wife is entitled under the laws to enter the United States of America.

III.

That said Quok Shee is unlawfully imprisoned, detained, confined and restrained of her liberty by Edward White, Commissioner of Immigration who is the person who has the care, [4] custody and control of the body of said Quok Shee at the Immigration Station of the United States at Angel Island, Bay of San Francisco, in this Northern District of California and is about to be deported therefrom to China.

IV.

That the illegality of said imprisonment, detention, confinement and restraint of liberty consists in the following, to wit: That your petitioner is a resident Chinese merchant lawfully domiciled in the city and county of San Francisco, State of California, and has been such merchant for twenty odd years past;

that on the 15th day of May, 1915, your petitioner departed from the United States to China on a temporary visit; that while in China and on or about February 21st, 1916, your petitioner was united in marriage according to the Chinese custom to the said Quok Shee; that thereafter, and in the month of July, 1916, your petitioner departed from China with his said wife for the United States arriving at this port of San Francisco, September 1st, 1916; that thereupon the said Quok Shee made application for admission to the United States as the wife of a merchant; that thereafter and on the 5th day of September, 1916, a hearing was had before J. B. Warner, Inspector, who reported favorably on said application; that thereafter the said Commissioner, Edward White, without good and sufficient or any cause, ordered a re-examination before the law department of immigration at Angel Island; that thereafter and on the 13th day of September, 1916, said application was reheard before one W. H. Wilkinson for the law section of said department of immigration who reported unfavorably upon said application; that thereupon said Edward White had a finding that said Quok [5] Shee had not established the existence of her relationship to her alleged husband, your petitioner, and the said application was thereupon denied; that thereafter the said Quok Shee appealed from said decision and finding to the Secretary of Labor at Washington, D. C. who subsequently ordered said Quok Shee deported, said deportation, to take effect Saturday, the 25th day of November, 1916.

That the said order and decision of Edward White, Commissioner of Immigration, and the said order and decision of the Secretary of Labor were made by them by reason of an abuse of discretion; that said abuse of discretion consisted of:

1. In ordering a re-examination of the witnesses on the application after a favorable report by the inspector before whom the application was heard and after proof of applicant's relationship.

2. Convincing proof of the relationship of said Quok Shee as wife to your petitioner was adduced at the first hearing of said application, September 5th, 1916, and of her right of entry to the United States, but not withstanding she was ordered deported.

3. Convincing proof of the relationship of said Quok Shee as wife to your petitioner was adduced at the said re-examination on September 13th, 1916, and of her right of entry to the United States but notwithstanding she was ordered deported.

4. No legal or any evidence to support or warrant deportation was presented to the said Edward White or the said Secretary of Labor proving or tending to prove that said Quok Shee was not the wife of your petitioner.

5. That the said Edward White, Commissioner of Immigration, refused to allow the attorneys for said Quok Shee to examine the report of the law officer who reported unfavorably on said application after the rehearing; that by reason of the said refusal the said attorneys were unable to intelligently or advisedly present the question at issue on the appeal to the Secretary of Labor, or to answer the facts evi-

denced, or therein contained detrimental to the applicant's claim by reason of the fact that it is impossible to find enough of conflict of unfavorable character in the record to have warranted the order and decision made. [6]

6. In addition of abuse of discretion aforesaid the illegality of said detention of Quok Shee consists of the following, to wit, that petitioner is informed and believes and therefore on such information and belief alleges that the said Edward White made his order, finding and decree of deportation under a mistake of law in this, that he demanded more than convincing proof to establish the relationship of said Quok Shee as wife of your petitioner.

That by reason of the foregoing Quok Shee is confined, detained and restrained of her liberty without due or any process of law and without proof of any kind or character establishing or tending to establish that Quok Shee was not or is not the wife of your petitioner and as such entitled to enter the United States of America.

V.

That said Quok Shee has exhausted all her rights and remedies and has no further rights or remedies before the department of labor and unless a Writ of Habeas Corpus issue out of this court as prayed for and directed to Edward White, Commissioner of Immigration in whose custody the body of said Quok Shee is, the said Quok Shee will be forthwith deported from the United States to China without due process of law; that your petitioner is the husband and next friend of said Quok Shee and makes this petition for

and on her behalf; that he is familiar with all the facts of the case and that said Quok Shee cannot petition this court in her own behalf by reason of said detention and restraint and that she requested your petitioner to make this petition for her.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus be issued by this Honorable Court directed to and commanding said Edward White, Commissioner of Immigration at the port of San Francisco to have and produce the body of the said Quok Shee before this Honorable Court, or to show cause [7] if any he has why the writ should not be granted, at the Postoffice Building in the city and county of San Francisco at a day and time certain to be fixed by this court in order that the alleged cause of imprisonment and detention of the said Quok Shee may be examined into in order that in case said detention and imprisonment is unlawful and illegal that the said Quok Shee may be discharged from the custody, detention and imprisonment. That a copy of this petition and the order prayed for is to be served on said Commissioner of Immigration.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Petitioner.

State of California,

City and County of San Francisco,—ss.

Chew Hoy Quong, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that the same has been read and explained to him; that he knows the contents thereof;

that the same is true of his own knowledge except as to the matters therein alleged on his information and belief and as to those matters he believes them to be true.

(Chinese Characters.)

CHEW HOY QUONG.

Subscribed and sworn to before me this 24th day of November, 1916.

[Seal]

JULIA W. CRUM,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 24, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [8]

In the District Court of the United States, in and for the Northern District of California.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of His Wife, QUOK SHEE.

Order to Show Cause.

GOOD CAUSE APPEARING THEREFOR, and upon reading the verified petition on file herein,

IT IS HEREBY ORDERED that Edward White, Commissioner of Immigration for the port district of San Francisco, appear before this court on the 29 day of November, 1916, at the hour of 10 o'clock of said day to show cause if any he had why a Writ of Habeas Corpus should not be issued herein as prayed for and that a copy of this order with said writ be served upon the said commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration aforesaid, or whoever acting under the orders of said commissioner and Secretary of Labor, shall have the custody of Quok Shee, are hereby ordered and directed to retain said Quok Shee within the custody of the said Commissioner of Immigration and within the jurisdiction of this court until further order herein.

November 24th, 1916.

M. T. DOOLING,

Judge of the United States District Court. [9]

Due service and receipt of a copy of the within Order and Petition is hereby admitted this 24th day of Nov. 1916.

JNO. W. PRESTON,

Attorney for Respondent.

[Endorsed]: Filed Nov. 24, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Friday, the 24th day of November, in the year of our Lord, one thousand nine hundred and sixteen. PRESENT: The Honorable MAURICE T. DOOLING, District Judge.

No. 16,119.

In the Matter of, QUOCK SHEE, on Habeas Corpus.

Minutes of Court—November 24, 1916—Order to Show Cause.

Pursuant to Order this day filed, it is ordered that Edward White, Commissioner of Immigration for the port of San Francisco, appear and show cause on November 29, 1916, at 10 o'clock A. M., why a Writ of Habeas Corpus should not issue as prayed and that a copy of this Order with copy of Petition herein be served upon said Commissioner. Further ordered that said Commissioner, or whoever acting under his orders and Secretary of Labor, shall have the custody of Quock Shee, retain said Quock Shee, within the custody of said Commisisoner of Immigration and within the jurisdiction of this Court until the further order herein. [11]

At a stated term of the District Court of the United States of America for the Southern Division of the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 9th day of December, in the year of our Lord one thousand nine hundred and sixteen. PRESENT: The Honorable MAURICE T. DOOLING, District Judge, et al.

No. 16,119.

In the Matter of QUOCK SHEE, on Habeas Corpus.

Minutes of Court—December 9, 1916—Hearing on Order to Show Cause.

This matter came on regularly this day for hearing of the order to show cause as to the issuance of

a writ of habeas corpus herein. C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent. Attorney for petitioner and detained was present. Mr. Ornbaun presented and filed Demurrers to the Petition for writ of habeas corpus and by consent of attorney for detained, the Court ordered that the immigration records likewise presented be filed as Respondent's Exhibits "A" and "B" and that the same be considered as a part of the said original Petition. Said matters were then argued by counsel for respective parties and ordered submitted. [12]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,119.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of QUOK SHEE.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon;

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,
United States Attorney,
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attys. for Respondent.

[Endorsed]: Filed Dec. 9th, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy. [13]

In the Southern Division of the United States District Court, for the Northern Division of California, First Division.

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG for a Writ of Habeas Corpus for
and on Behalf of His Wife, QUOK SHEE.

**Demurrer to Amended Petition for Writ of Habeas
Corpus.**

Now comes the respondent, Edward White, Commissioner of Immigration at the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of

habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon;

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,

United States Attorney,

CASPER A. ORNBAUN,

Asst. United States Attorney,

Attorneys for Respondent.

[Endorsed]: Filed Dec. 9th, 1916. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy. [14]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,119.

In the Matter of QUOK SHEE, on Habeas Corpus.

DION R. HOLM, Esq., and ROY A. BRONSON,
Esq., Attorneys for Petitioner.

JOHN W. PRESTON, Esq., United States Attorney, and CASPER A. ORNBAUN, Esq.,
Assistant United States Attorney, Attorneys for Respondent.

Order on Demurrer to Petition for a Writ of Habeas Corpus.

The demurrer to the petition for a writ of habeas corpus herein is sustained, and said petition denied.

December 15th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 15, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the District Court of the United States, in and for the Northern District of California.

No. 16,119.

In the Matter of the Application of CHEW HOY QUONG, for a Writ of Habeas Corpus for and on Behalf of His Wife, QUOK SHEE.

Notice of Appeal.

To the Honorable JOHN W. PRESTON, United States Attorney, and Honorable CASPER A. ORNBAUN, Assistant United States Attorney, Attorneys for Respondent, and to the Clerk of the Above-entitled Court:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the petitioner in the above-entitled action, Chew Hoy Quong, through his attorneys, Dion R. Holm and Roy A. Bronson, feeling himself aggrieved by the judgment of the above-entitled court rendered on December 16th, 1916, sustaining the Demurrer to the Petition for a writ of habeas corpus and denying his application for a writ of habeas corpus, hereby appeals from said judgment and decision to the Circuit Court of Appeals for the Ninth Circuit.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner.

Dated, December 19, 1916.

Due service and receipt of a copy of the within Notice of Appeal is hereby admitted this 19 day of Dec., 1916.

JNO. W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [16]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Petition for Appeal.

To the Honorable M. T. DOOLING, Judge of the
District Court of the United States for the
Northern District of California:

Chew Hoy Quong, the petitioner in the above-entitled matter, appellant herein, feeling aggrieved by the order and judgment made and entered in the above-entitled cause on the 16th day of December, 1916, whereby it was ordered and adjudged that the Demurrer to the Petition for a Writ of Habeas Corpus be sustained and the Application and Petition for the Writ of Habeas Corpus denied, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents and all of the papers upon which said order and judgment were based duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in accordance with the law in such case made

and provided, and that all further proceedings in this matter be stayed until the final determination of said appeal.

Dated, December 19, 1916.

DION R. HOLM,
ROY A. BRONSON,

Attorneys for Petitioner. [17]

Service of the within Petition by copy admitted this 19 day of Dec., 1916.

JNO. W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [18]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Assignment of Errors.

Now comes the petitioner in the above-entitled matter by his attorneys, Dion R. Holm and Roy A. Bronson, and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment made by this Honorable Court on the 16th day of December, A. D. 1916:

1. That the Court erred in denying the petition for a Writ of Habeas Corpus.

2. That the Court erred in sustaining the Demurrer to the petition for a Writ of Habeas Corpus.

3. That the Court erred in not granting the petition for a Writ of Habeas Corpus and in not discharging Quok Shee.

4. That the Court erred in finding that the ordering of a re-examination of the witnesses on the application for admission after a favorable report by the Inspector before whom the application was heard after proof of applicant's relationship was given, was not an abuse of discretion on the part of the Commissioner of Immigration.

5. That the Court erred in finding that there was not an abuse of power on behalf of the Immigration Commissioner in exacting more than convincing proof of the relationship of petitioner and Quok Shee.

6. That the Court erred in holding that there was legal or any evidence to support or warrant deportation presented to the Commissioner of Immigration or to the Secretary of Labor, proving, or tending to prove, that the said Quok Shee was not the wife of your petitioner. [19]

7. That the Court erred in holding that Quok Shee was not given a fair hearing because of the failure of the Commissioner of Immigration to permit the attorneys for said Quok Shee to examine the report of the law officer who reported unfavorably on said application, so that the attorneys could intelligently and advisedly meet the reasons for ex-

cluding Quok Shee when the case was taken on appeal to the Secretary of Labor.

8. That the Court erred in holding that the Commissioner of Immigration and the Secretary of Labor did not make their finding and decree of deportation under a mistake of law.

WHEREFORE, because of the many manifest errors committed by said Court, Chew Hoy Quong, through his attorneys, prays that the said judgment sustaining the Demurrer to the petition for a Writ of Habeas Corpus and denying the petition for a Writ of Habeas Corpus, be reversed, and for such other and further relief as the Court may think meet and proper.

Dated, December 19, 1916.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Petitioner.

Service of the within Assignment of Errors by copy admitted this 19 day of Dec., 1916.

JNO. W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [20]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Order Allowing Appeal.

On motion of Dion R. Holm and Roy A. Bronson, attorneys for Chew Hoy Quong, petitioner in the above-entitled cause,

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and judgment heretofore made and entered herein, sustaining the Demurrer to the petition for a writ of habeas corpus and denying the application for a writ of habeas corpus, be and the same is hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the manner and time prescribed by law and that meanwhile all further proceedings in this court be suspended, stayed and superseded until the determination of said appeal.

Dated December 20th, 1916.

M. T. DOOLING,
Judge of the District Court of the United States in
and for the Northern District of California.

Service of the within Order Allowing Appeal by
copy admitted this 19 day of Dec., 1916.

JNO. W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for and
on Behalf of His Wife, QUOK SHEE.

Citation on Appeal (Copy).

United States of America,—ss.

The President of the United States to Commissioner
of Immigration at Port of San Francisco,
GREETING:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the city and
county of San Francisco, in the State of California,
within thirty days from the date of this writ, pur-
suant to an order allowing an appeal, filed in the
clerk's office of the United States District Court in
and for the Northern District of California, wherein
Chew Hoy Quong is appellant and you, Edward
White, Commissioner of Immigration at the port of
San Francisco, California, are appellee, to show
cause, if any there be, why the judgment in said
appeal mentioned should not be corrected, and
speedy justice should not be done to the parties in
that behalf.

WITNESS, the Honorable MAURICE T. DOOL-
ING, United States District Judge for the Northern

District of California, First Division, this 20th day of December, 1916.

M. T. DOOLING,
United States District Judge. [22]

Received a copy of the within Citation this 19th day of December, 1916.

JOHN W. PRESTON,
United States District Attorney.
CGH.

[Endorsed]: Filed Dec. 20, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [23]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG for a Writ of Habeas Corpus for
and on Behalf of His Wife, QUOK SHEE.

Stipulation (as to Exhibits).

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties in the above-
entitled cause that the original record of the Bureau
of Immigration, which was filed in the above-entitled
court as respondent's exhibit may be transferred in
its original form and without being transcribed, to
the United States Circuit Court of Appeals for the
Ninth Circuit and the same is and may there be con-
sidered part of the record in determining this cause
on appeal to the said United States Circuit Court of
Appeals for the Ninth Circuit without objection on
the part of either of said respective parties.

AND IT IS FURTHER STIPULATED that the testimony attached to the petitioner's amendments to his petition for a Writ of Habeas Corpus need not be transcribed, as they are contained in the original record of the Bureau of Immigration.

Dated December 27th, 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Assistant United States Attorney.

DION R. HOLM,

ROY A. BRONSON,

Attorneys for Chew Hoy Quong.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG for a Writ of Habeas Corpus for
and on Behalf of His Wife, QUOK SHEE.

Order (as to Exhibits, etc.).

IT APPEARING to the Court that it is both necessary and proper that the original papers and records referred to in the above-entitled stipulation should be inspected in the United States Circuit Court of Appeals, for the Ninth Circuit, in determining the appeal of said cause.

IT IS HEREBY ORDERED that the said original record be transferred by the clerk of said court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to be retained by said clerk until the appeal in the above-entitled cause is properly disposed of at which time the original papers and records may be returned to the clerk of the above-entitled court and that petitioner need not transcribe the exhibits or testimony attached to his amendments to his petition for a writ of habeas corpus.

Dated December 27th, 1916.

WM. H. HUNT,
Judge of the District Court.

[Endorsed]: Filed Dec. 27, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

**Certificate of Clerk U. S. District Court to Transcript
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 25 pages, numbered from 1 to 25, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the matter of Quok Shee on Habeas Corpus, No. 16,119 as the same now remain on file and of record in this office said Transcript having been prepared pursuant to and in accordance with "Praeceptum for Transcript of Record" (copy of which is embodied in this transcript), and the instructions of the attorney for the petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of eleven dollars and sixty cents (\$11.60), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein (page 27).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of January, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By T. L. Baldwin,

Deputy Clerk. [26]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 16,119.

In the Matter of the Application of CHEW HOY
QUONG, for a Writ of Habeas Corpus for
and on Behalf of His Wife, QUOK SHEE.

Citation on Appeal (Original).

United States of America,—ss.

The President of the United States to Commissioner
of Immigration at Port of San Francisco,
GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city and county of San Francisco, in the State of California,

within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court in and for the Northern District of California, wherein Chew Hoy Quong is appellant and you, Edward White, Commissioner of Immigration at the port of San Francisco, California, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, First Division, this 20th day of December, 1916.

M. T. DOOLING,
United States District Judge. [27]

[Endorsed]: No. 16,119. U. S. District Court in and for the Northern District of California. In the Matter of the Application of Chew Hoy Quong for a Writ of Habeas Corpus for and on Behalf of His Wife. Quok Shee. Citation on Appeal. Filed. Dec. 20, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Received a copy of the within Citation this 19th day of December, 1916.

JOHN W. PRESTON,
United States District Attorney.
CGH.

[Endorsed]: No. 2926. United States Circuit Court of Appeals for the Ninth Circuit. Chew Hoy Quong, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. In the Matter of the Application of Chew Hoy Quong for a Writ of Habeas Corpus for and on Behalf of His Wife, Quok Shee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed January 18, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit *2*

CHEW HOY QUONG,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong, for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

BRIEF FOR APPELLANT.

Filed

MAY 2 - 1917

DION R. HOLM, **F. D. Monckton,**
Clerk.

ROY A. BRONSON,

Attorneys for Appellant.

Filed this.....*day of May, 1917.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

CHEW HOY QUONG,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from an order of the District Court of the United States in and for the Northern District of California, sustaining a demurrer to a writ of habeas corpus and denying said petition (Transcript, p. 15).

In the year 1881, Chew Hoy Quong, your petitioner, came to the United States and was duly

admitted to this country. Immediately upon his arrival he became associated with his uncle in a general merchandise establishment at San Francisco. A few years after his arrival his uncle died, leaving him in the entire control of the business. He assumed and carried on this concern up to the year 1906, when the earthquake and fire devastated the establishment. Shortly after the fire he repaired to Holt Station where he organized a company and continued in that concern for several years. He later became associated with the Chinese Herb Co. in San Francisco known as Dr. Wong Him Herb Co. and still maintains and has now an interest in this last named concern.

On May 15, 1915, Chew Hoy Quong made a trip to China and on February 21, 1916, married Quok Shee at Hong Kong, China. The ceremony was performed according to the new Chinese custom and the two parties lived together as husband and wife in Hong Kong from February 21, 1916, until some time in August, 1916, when they sailed for the United States. They arrived at the Immigration Station at Angel Island September 1, 1916.

Without further trouble Chew Hoy Quong was permitted to land on the theory of his being a returning merchant, having supplied himself with Form 431 before his departure. There is absolutely no question as to his status as a merchant. His wife, Quok Shee, has not been permitted to land and is still held in custody at the Immigration Station.

A thorough, complete and searching examination was held shortly after their arrival from China by Inspector J. B. Warner who, on September 5, 1916, reported favorable on the landing of your petitioner's wife. Later, and for reasons that do not appear in the record, a rehearing of the entire matter was held before the Law Section for the Immigration Bureau, Mr. Wilkinson conducting the hearing. On September 15, 1916, Mr. Wilkinson reported as to the proposed landing unfavorable, and on the same day Commissioner White made his finding excluding Quok Shee on the ground that the relationship of husband and wife was not established to his satisfaction. The then attorneys of record for Quok Shee appealed to the Secretary of Labor where the finding of Commissioner White was approved and an order of exclusion made.

We then petitioned for a writ of habeas corpus which was denied and this appeal was duly taken.

When the order to show cause why the writ should not issue was heard, respondent filed in open court the original records of the Department of Immigration and by stipulation of counsel and order of court said original records were to be considered a part of the petition (Transcript, pp. 11-12).

It was later stipulated and the District Court so ordered that these records be transferred to this court for consideration without being transcribed

(Transcript, pp. 24-25). References herein to said records will be noted as follows (Record, p.....).

Argument.

Our argument for the issuance of the writ may be divided under three heads:

1. That the Commissioner was either (a) without power to order a rehearing of the application, on his own motion, after at a full and fair hearing applicant had established her right to enter and the examining inspector had made his favorable report thereon; or, (b) under the circumstances of this case such order constituted a manifest abuse of discretion.

2. That a full and fair hearing was not given the applicant on the re-examination of the husband and wife.

3. That the finding of the Commissioner totally disregarded the evidence and was not based on the failure to prove the relationship but was grounded upon a mere inference, suspicion or conjecture that the applicant was being imported for an immoral purpose.

I.

(a) In regard to our first contention the record discloses that on September 5, 1916, a hearing on the application of the detained was held before In-

spector J. B. Warner. The applicant and her husband were both examined and the husband recalled. This testimony appears on pages 2 to 10, Exhibit "A" of the Record. This hearing reveals that the testimony of each witness co-ordinated to the minutest detail and not one single discrepancy or even alleged discrepancy existed. The examining inspector's report was favorable and recommended admission (Record, p. 10).

There was not one contradiction nor was there a single statement made by either party that could in any way discredit their testimony. It is apparent by a reading of the record that the testimony adduced at the first hearing established the marriage relation beyond the question of a doubt.

Commissioner White arbitrarily and *without any cause whatsoever* ordered the applicants to reappear for another examination (Record, p. 11).

We contend that the commissioner exceeded his authority in ordering this rehearing and that under the statutes and rules of immigration there is no such power given.

In the first place should such conduct be held allowable where there is no substantial evidence in support thereof, it would empower the commissioner to order and re-order examinations of applicants *ad infinitum* until by industry of severe cross-questioning seeming irregularities could be elicited to sustain an order of deportation. If such power is held to reside in the commissioner it would mean

that he is empowered to postpone indefinitely any landing he may desire without regard to human liberty and human rights. It means that on mere suspicion he may disregard the evidence and proved facts and set about to entangle an applicant in the snares of a merciless examination. We do not contend that where other witnesses are to be heard, or discrepancies to be explained, or where there is substantial evidence to support it, that the commissioner has not such power; it is only when such order is *arbitrarily* made without *any ground or reason* whatsoever after a full and fair hearing that we insist the commissioner acts in excess of his authority.

“The general rule is that uncontradicted evidence free from inherent improbability * * * and in no way discredited is conclusive.”

“Even the statements of a Chinaman, himself, who is seeking admission to this country, when uncontradicted by anything in the case and when not incredible on its face was affirmative proof of lawful right to remain.”

“A commissioner may not arbitrarily, capriciously or against reasonable unimpeached and credible evidence which is not contradicted in its material points and susceptible of but one fair construction refuse to be satisfied. * * * ”

Vol. 2, Corpus Juris, pp. 1103-1104;

Moy Gue Lum v. United States, 211 Fed. 91;

Lim Sam v. U. S., 189 Fed. 534.

(b) But if it be held that such action on his part is not enjoined by law, then we contend that it is a clear abuse of discretion.

First, because it ignores the “indisputable character of the evidence”, and, second, because it shows a spirit hostile to both the law and the applicant alike.

As to the first proposition it has been pointed out that a full and fair hearing was conducted in the first instance. The examination was not only complete but exhaustive. The co-ordination of the testimony of both husband and wife was of such a character as to *conclusively* establish the relationship. To say that it did not (which the order for rehearing in effect says) is to ignore the “indisputable character of the evidence”.

In *Whitfield v. Hanges*, 222 Fed. 745, this court held:

“Administrative findings and orders quasi judicial in character are void if there was no *substantial evidence* to support them or if they are contrary to the ‘indisputable character of the evidence’.”

Citing School of Magnetic Healing v. McAnnulty, 187 U. S. 94 et seq.

That case further holds that whether or not there was any substantial evidence is a *question of law*, the power and duty to determine which is vested in the courts.

It is held in the following cases that the courts will not ordinarily review the evidence in this class of cases, “but we may consider the *question of law* whether there was evidence to sustain the conclusion” of the immigration official.

Ong Chew Lung v. Burnett, 232 Fed. 853;

Chan Kam v. U. S., 232 Fed. 855.

Again, where such a clear right to admission is made out as was in the hearing of September 5th such an arbitrary and unwarranted order made without giving any rhyme or reason therefor is clearly indicative of a hostile spirit toward the case.

In *Ex parte Lee Dung Moo*, 230 Fed. 746, and *Ex parte Tom Toy Tin*, 230 Fed. 747, it was held that a spirit hostile to either the law or applicant constituted an *unfair hearing* and denial of due process of law.

We submit therefore that the order for a rehearing, after a full, fair and complete examination and proof of relationship and after the examining inspector had recommended admission constituted either an act in excess of authority or a manifest abuse of discretion.

THAT A FULL AND FAIR HEARING WAS NOT GIVEN THE
APPLICANT ON THE RE-EXAMINATION OF SEPTEMBER 15,
1916.

Among the grounds the excluding order, of both the commissioner and the Secretary of Labor, was based upon certain alleged discrepancies existing in the testimony of the husband and wife (Record p. 26, and Record p. 62).

This court cannot weigh the sufficiency of the evidence, it is true, but it can and *must* examine that evidence to ascertain whether or not it was contradicted or really discredited in order to justify

deportation, or if there is some evidence to support the finding (118 Fed. 442).

The court must further examine it to see whether or not a *full and fair hearing* was had, and it may also be examined to ascertain whether or not the finding was clearly against the weight of evidence.

U. S. v. Chung Fung Sun, 63 Fed. 261;
Whitfield v. Hanges, 222 Fed. 745.

Our contention as to these alleged discrepancies is that the witnesses were not given a *full and fair* hearing or examination on the facts claimed to be contradicted. A seeming conflict was elicited and then the examination ceased without *offer or opportunity* of explanation.

This court can take judicial notice of the fact that it is a simple matter for a clever interrogator to tangle a witness so that seeming discrepancies and inconsistencies appear in his testimony and in ordinary actions it is usually the function of opposing counsel on redirect to clear these matters. However, under these "star chamber" proceedings (as designated by Justice Brewer) no counsel is allowed to be present to defend his client from the snares of the rigid examination, and it must be the province of this court to carefully examine the completeness of the examination where it touches the facts which constitute the alleged discrepancies.

Since neither witness knows how full an answer was given by the other the court should see that the *same* question is propounded to each, or that a

set of questions is given which will elicit a full answer on the facts. If this is done and the answers are contradictory a *bona fide* discrepancy is obtained. Otherwise there may exist an *apparent* discrepancy which could be easily cleared had the questions been so framed as to elicit the entire truth. In other words a *part* of the truth may often appear to contradict the whole truth. No better example of this can be cited than one appearing in this very case upon the first hearing.

The husband testified as follows:

“Q. Did you ever visit your home village after you married this woman?

A. Yes. I went home once” (Record, p. 8).

The wife testified as follows:

“Q. Tell us exactly how many times your husband was away from home over night after you married him the 19th of the 1st month, this year.

A. I don't remember how many times—a number of times.

Q. Did he tell you he was going to his home village each time?

A. Yes.

Q. Did he go more than once?

A. A number of times. I don't remember how many times—more than two times.”

The husband was then recalled and testified as follows (Record, Exhibit “A”, p. 3):

“Q. I want to know how many times you visited your village after your marriage.

A. Only once.

Q. Are you positive of that?

A. I am positive I only made one trip.”

Had the inspector stopped at this point respondent would have had a discrepancy upon which to rely far stronger than any which he now points out and had he so ceased his examination at this point appellant would have been before this court urging the selfsame contention that he now urges against the other so-called discrepancies, viz., that the *examination on the fact is not full and fair* and no offer or opportunity is made to explain the facts fully or to arrive at the whole truth.

Inspector Warner, however, reverted to the questions (Record, p. 3):

“Q. Were you away from your village at any other time?

A. No.

Q. Are you positive of that?

A. I was in Macao; a friend of mine invited me to a celebration there for 2 days, on 2 different occasions.”

Hence a seeming discrepancy between the testimony of the husband and wife is instantly cleared by a single question calculated to get at the entire truth.

In *Ching Loy You*, 223 Fed. 833, the court said:

“The refusal to permit an alien representation by counsel, places upon the immigration officers the *burden* of showing the fairness of the proceeding. There must be an honest effort to establish the truth.

The essential thing is that *there shall have been an honest effort to arrive at the truth* by methods sufficiently fair and reasonable to amount to due process of law.”

Now a most casual examination of the testimony adduced at the re-examination of the husband and wife (Record, pp. 9 to 23), and glance at the discrepancies on which the excluding order partly was based (Record, p. 62) will disclose that the second examining inspector, Wilkinson, did not give a full and fair hearing on the facts upon which respondent alleges inconsistencies and an honest effort to arrive at the whole truth is not disclosed by this re-examination.

There are seven alleged discrepancies (Record, p. 62 and p. 26). The first is no discrepancy at all and has heretofore been treated, namely as to the number of times the husband went to his home village. The other six are fully explained in the husband's affidavit (Record, pp. 37-8-9) and the alleged discrepancies are so patently reconcilable that it would avail nothing to encumber this brief with an explanation thereof. After reading the husband's explanation in his affidavit and then reverting to the examination (Record, pp. 9 to 23) it will be entirely manifest that Inspector Wilkinson did not give a full and fair examination on the facts upon which the finding is in a measure based.

Aside from these minor matters, of which respondent makes a mountain, no mention is made by him of the wonderful co-ordination of facts testified to by the husband and wife even down to the most insignificant detail. Especially is this

true of the wedding ceremony, the go-betweens, the preliminary proceedings and the feast itself.

It is only by a survey, with the proper perspective of the whole field of testimony, giving to each statement its bearing on the whole that one can arrive at the real truth. It is in fact extraordinary that from the severe examination to which applicant and her husband were subjected more glaring defects were not brought to light.

Where great weight is placed on the testimony in regard to the clock, page after page of testimony as to all the other household furnishings is totally ignored.

However this touches upon the weight of evidence and we do not ask the court to weigh it. We rest this point on the contention that a *full* and *fair* examination was not given on the facts alleged to be contradictory and that the questioning of the re-examining inspector does not show a real effort to arrive at the whole truth.

The discrepancies in the case are trivial, natural mistakes that any two honorable persons may fall into and the evidence adduced has not that mathematical certainty about it that would create suspicion and designate the case as memorized.

III.

THAT THE FINDING OF THE COMMISSIONER TOTALLY DISREGARDED THE EVIDENCE AND WAS NOT BASED ON A FAILURE TO PROVE THE RELATIONSHIP BUT ON A MERE SUSPICION THAT THE APPLICANT WAS BEING IMPORTED FOR AN IMMORAL PURPOSE.

The first act on the part of the department which strongly indicates the above proposition was the arbitrary order for a rehearing after a complete and exhaustive examination had been had, at which not one single discrepancy was adduced and upon which Inspector Warner reported favorably. Why then did the commissioner order a rehearing? Such proceeding will strike the court as unusual as it is in reality. The only open inference suggested by this unusual course is, that suspicion had been cast upon the applicant from some outside source. Let us therefore examine the record to ascertain whether such inference is therein sustained.

On page 62 of the Record the memorandum for the assistant secretary contains the following:

" * * * 4. SUBSTANCE OF RECORD FAVORABLE TO CASE: Parts of testimony of applicant and alleged husband in harmony. Possibility of relationship shown.

5. SUBSTANCE OF RECORD ADVERSE TO THE CASE: Discrepancies between testimony of applicant and that of alleged husband. *Improbability of relationship because of unsuitability of ages of contracting parties.*"

Equally with the discrepancies the *conjecture* as to ages is given as a reason adverse to the case!

After a short recital of the facts the very first paragraph of the memorandum contains the following:

"It is worthy of note that the alleged husband of the applicant although 56 years of age was never before married until last year which event occurred shortly after his return to China. This omission or postponement on his part of compliance with the ancient and established usages and customs of Chinese until so late in life *lends suspicion as to the relationship*. Another *damaging* factor is the unsuitability of ages found in this case. Chinese customs frown upon the marriage of old men and young girls. In addition to the foregoing *suspicious* circumstances there appear the following discrepancies in the testimony of the applicant and alleged husband. * * *"

Here follow the discrepancies which have been heretofore referred to.

The supplementary memorandum for the assistant secretary contains the following (Record, p. 63):

"While this is a closer case than Mah Shee, submitted simultaneously, the Bureau is of the opinion that the appeal should not be sustained. The discrepancies pointed out in its previous memorandum *if taken individually do not amount to much*. If taken collectively, however, they amount to considerable and create such a doubt that the Bureau is unable to hold that the applicant has successfully carried the burden upon her by law to make an affirmative and satisfactory showing.

The above is a supplemental discussion of the case purely and simply as a matter of evidence. The following should be said in a general way.

The Bureau's experience with the landing of young Chinese women brought over as the 'wives' of old Chinese men has not been such as to give it much confidence in this class of cases. Several very recent experiences have emphasized the fact that girls so brought over may be of the highest respectability and yet be imported with the intention to sell them for immoral purposes or to turn them over to some person, not entitled himself to bring a wife.

The Bureau again recommends that the decision of the commissioner at San Francisco be affirmed.

ALFRED HAMPTON,
Acting Commissioner General.

Approved
LOUIS F. POST,
Assistant Secretary."

A similar statement is made by the 2nd examining inspector at Angel Island in his memorandum for the commissioner (Record, p. 26).

From the foregoing excerpts it becomes quite evident that the excluding order was not based upon the evidence. Indeed the department officials are apparently convinced that the applicant was married to her husband. Such phrases as "probability of relationship shown" and "the discrepancies taken singly do not amount too much" and the favorable report of Inspector Warner betray their real conviction, while the long dissertations on the unsuitability of ages, the experience of the Bureau and the suspicion of immoral purposes betray the real reason for exclusion.

But under the *Que Lim* case, 176 U. S. 459, the wife of a merchant is entitled to enter as such and, her relationship once established, she cannot be excluded upon mere suspicion and conjecture.

In *re Ong Chew Hung v. Burnett*, 232 Fed. 853, the court held, speaking through Circuit Judge Gilbert:

“It is not our function to weigh the evidence in this class of cases; but we may consider the question of law whether there was evidence to sustain the conclusion that appellant, when he first came, fraudulently entered the United States. *We find the conclusion rests upon conjecture and suspicion and not upon the evidence.* In the absence of substantial evidence to sustain the same, an order of deportation is arbitrary and unfair and subject to judicial review.”

Judge Morrow in the case of *Chan Kam v. U. S.*, adopts that portion of Judge Gilbert’s opinion above quoted.

U. S. v. Howe, 235 Fed. 990.

In the last cited case, *U. S. v. Howe*, Hilda Ross Cavanaugh sought admission into this country from Great Britain. Two grounds were urged for deporting her—first, that of immoral character, since abandoned; second, that she might become a public charge and upon this latter ground she was ordered deported. Writ of habeas corpus applied for and granted—court saying at page 992:

“The immigrant was apparently held or stopped in her passage to this country as a re-

sult of an anonymous letter written to the authorities, and which had to do with the morality of the immigrant and her relations with one Clarence D. Levy, with whom she had an association on her last visit. However meritorious this claim may have been, it is out of the case now, since the finding, as shown by the return, indicates she is not being held for deportation because of this charge. *I fear that uppermost in the consideration of those who have passed upon the case before has been an influence wielded against the applicant for admission because of her alleged relations with Levy. * * * Innuendo, surmise or guess of immorality will not suffice."*

In this case, too, it must be apparent to the court that the order was based—*not upon the evidence* but upon mere *suspicion and conjecture*, based upon the Bureau's experience in cases where there was a wide divergence in age.

If the department was anxious to rely on the evidence why did they order a rehearing when a complete and exhaustive hearing had proved the relationship?

Why at the second hearing did they develop seeming discrepancies and then stop short refusing to propound questions calculated to arrive at the whole truth?

Why in the second examining inspector's report (Record, p. 26) and in the two memorandums for the assistant secretary at Washington (Record, pp. 62-3) is such great stress laid on the suspicion of immoral purpose?

Why is the excuse ~~made~~ that "the discrepancies taken singly do not amount to much but collectively do" made?

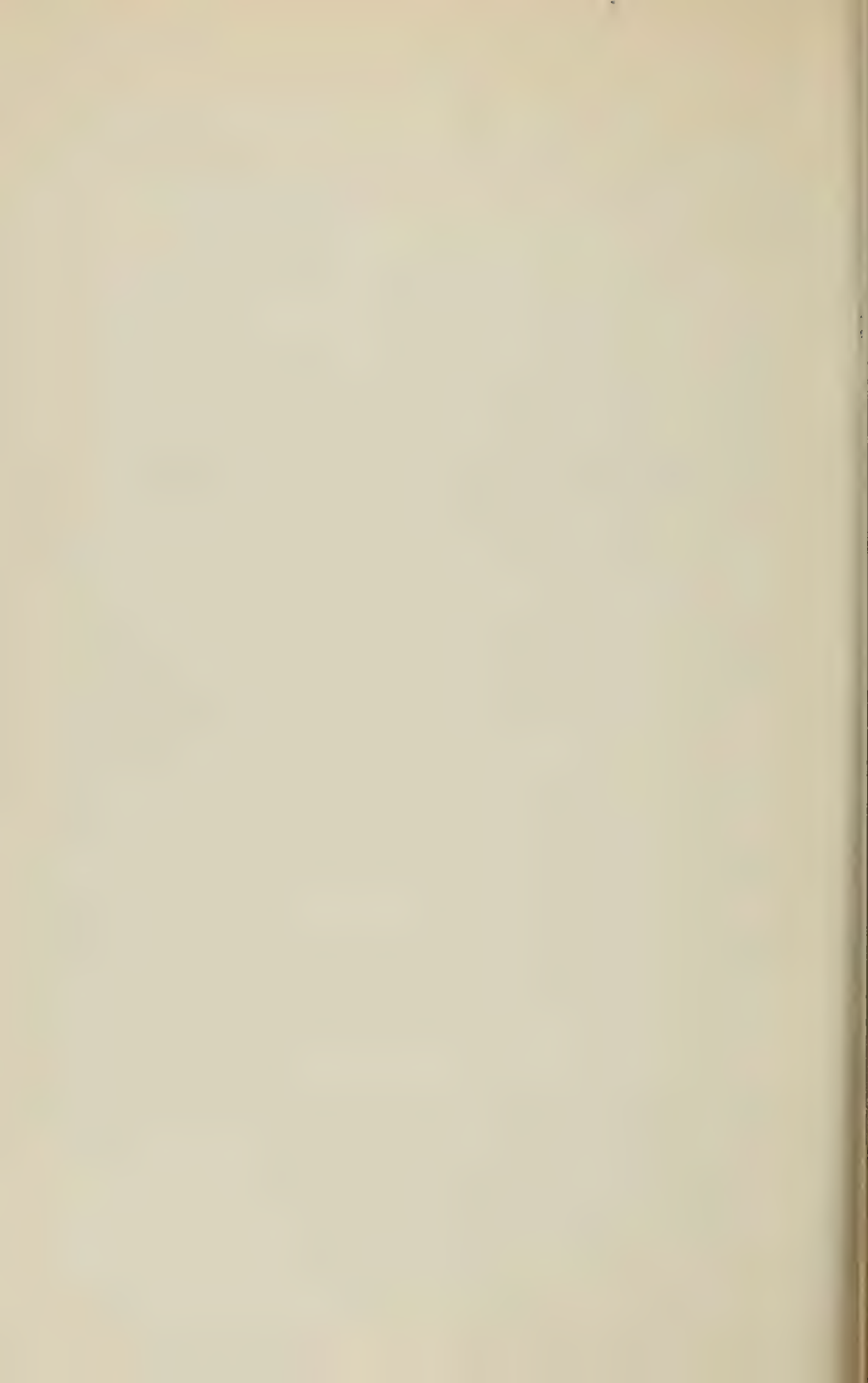
The answer to these queries is manifest and we submit that it is quite apparent from the face of the record that the order of exclusion involves an abuse of discretion, the denial of a full and fair hearing and is based upon suspicion and conjecture.

We respectfully submit that the order should be reversed and that the writ should issue as prayed.

Dated, San Francisco,

May 7, 1917.

DION R. HOLM,
ROY A. BRONSON,
Attorneys for Appellant.



No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

VS.

EDWARD WHITE, as Commissioner
of Immigration at the Port of San
Francisco, California,

Appellee.

*In the Matter of the Application of Chew Hoy
Quon, for a Writ of Habeas Corpus for and
on Behalf of His Wife, Quok Shee.*

BRIEF OF APPELLEE

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

Filed this.....day of May, 1917.

MAY 21 1917

FRANK D. MONCKTON, *F. D. Monckton,*
Clerk. *Clerk.*

By....., Deputy Clerk.

No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

VS.

EDWARD WHITE, as Commissioner
of Immigration at the Port of San
Francisco, California,

Appellee.

*In the Matter of the Application of Chew Hoy
Quon, for a Writ of Habeas Corpus for and
on Behalf of His Wife, Quok Shee.*

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The applicant in this case applied for admission at San Francisco as the wife of Chew Hoy Quong, whom she accompanied to the United States, claiming to be the wife of said Chew Hoy Quong. It is admitted that the alleged husband, Chew Hoy Quong, is a merchant and at the time of the application was fifty-six years of age and his alleged wife twenty years of age.

This matter comes before the Court in the usual form of cases of this character, Judge Dooling having sustained the Government's demurrer interposed to the petition for writ of habeas corpus filed on behalf of applicant. There is a stipulation on file providing that the original record of the Bureau of Immigration, which contains all of the evidence taken in this case, be forwarded to the above entitled Court so that it may be considered as a part of the record in determining this case.

ASSIGNMENT OF ERRORS.

It will be noted on page 4 of the brief filed on behalf of appellant that counsel relies upon three propositions, stated as follows:

1. That the Commissioner was either (a) without power to order a rehearing of the application, on his own motion, after at a full and fair hearing applicant had established her right to enter and the examining inspector had made his favorable report thereon; or, (b) under the circumstances of this case such order constituted a manifest abuse of discretion.

2. That a full and fair hearing was not given the applicant on the re-examination of the husband and wife.

3. That the finding of the Commissioner totally disregarded the evidence and was not based on the failure to prove the relationship but was grounded

upon a mere inference, suspicion or conjecture that the applicant was being imported for an immoral purpose.

ARGUMENT

We are confronted in this case with the same proposition that is injected into practically every Immigration case that comes before this Court, namely: that the Immigration officials acted in a biased manner and did not accord the applicant a fair and impartial hearing. In fact, in this case, as in many of the other cases, counsel assumes that the investigating officers are harboring a feeling of antipathy against the Chinese race and are eager to exclude them, notwithstanding the fact that the evidence adduced would amply justify such order of exclusion, and in this connection the Government desires to take the position now that there is no such disposition exhibited on behalf of the Immigration officials, and in fact, the examinations conducted in this case will show the extreme fairness on the part of the Immigration officials in arriving at a just conclusion.

Counsel seems to dwell upon the point that the Commissioner had no power to order a rehearing of the applicant after the first examination. This, however, is an entirely erroneous view, for it is the duty of the Commissioner of Immigration to make as many investigations or to conduct as many hearings as he deems advisable in order to arrive at a proper and correct determination of the matter

before him. In this case one rehearing was ordered, and testimony taken, and the examinations brought out various discrepancies which, after a careful consideration, indicated to the Immigration officials that the relationship of husband and wife had not been properly established.

The Government submits that in a case of this character the investigating officials are in a better position to determine the matter before them than any one else. They are experienced in their examinations of aliens, thoroughly familiar with their customs and habits and are naturally in a better position to detect fraud than persons who are not so situated and so versed. It was evidently for this reason that the Immigration officials were given such unlimited power. It is true that after the first examination there was a favorable report, said report appearing on page 10 of the original record of the Bureau of Immigration on file herein, but it is also true that the examinations of said applicant and her alleged husband brought forth various discrepancies in their testimony, which no doubt justified the Secretary of Labor in finding that the relationship of husband and wife had not been sufficiently established.

On pages 60, 61 and 62 of the record of the Bureau of Immigration will be found a review of the discrepancies which appeared in the testimony of said applicant. This review reads as follows:

This Chinese girl applied for admission at San Francisco, as the wife of Chew Hoy Quong, whom she accompanied to the United States, and whose status as a merchant of a Chinese firm in San Francisco, Cal., is established. The record shows that the alleged husband entered this country in 1881, established himself as a merchant, resided here continuously until last year, when he had his status preinvestigated and went to China, leaving the port of San Francisco on May 15th, 1915, per SS. "Manchuria," and returning to the United States with the above-named applicant on September 1st, 1915, per SS. "Nippon Maru."

It is worthy of note that the alleged husband of the applicant, although 56 years of age, was never before married until last year, which event occurred shortly after his return to China. This omission or postponement on his part of compliance with the ancient and established usages and customs of Chinese until so late in life lends suspicion as to the relationship. Another damaging factor is the unsuitability of ages found in this case.

Chinese customs frown upon the marriage of old men with young girls. In addition to the foregoing suspicious circumstances, there appear the following discrepancies in the testimony of applicant and alleged husband:

A. Applicant states at two different hearings that after her marriage she lived with her husband for a period of seven months, or until the date of their departure for the United

States, at No. 20 Wah Hing St., Hongkong; that during this period her husband visited his native village a number of times, but does not remember how many, whereas the alleged husband testified positively on two occasions that he visited the village but one time.

B. Alleged husband claims to have adopted one of his brother's sons, aged about 15, for ancestral duties; that this boy, together with his natural father, visited him in Hongkong about a week before he and his wife sailed for the United States; that during this period the father and son lived on the second floor of the same building of which he and his wife occupied the third floor. On the other hand the applicant first testified that she never saw this adopted son, but later stated that he accompanied her to the steamer at the time of sailing; also that he had come to Hongkong with his natural father, but that she did not know where they slept, as they had never mentioned it.

C. In further reference to the adopted son, the alleged husband testified that during the course of the boy's stay in Hongkong, approximating one week, he made frequent visits to their home on the third floor of the same building, whereas the applicant stated that she never saw the boy except on one occasion, viz: the day of their departure, when he accompanied them to the steamer; and that he only arrived in Hongkong on the day they sailed.

D. The alleged husband testifies that in proceeding from their home to the steamer he and his alleged wife were accompanied by his

brother, his adopted son, and a member of the firm occupying the first floor of the building where he had lived since marriage, while the applicant says that there were but three men in the party, her husband, his brother, and his adopted son.

E. While applicant and alleged husband agree that they lived on the third floor of the building at No. 20 Wah Hing St., Hongkong, for approximately seven months, the latter states that the entire second floor was used as storage rooms by the firm occupying the first floor, with the exception of the last five days of his residence there, when one Wong Quock Bun, his wife, and baby moved in, and the former avers that during the entire period of her residence there the second floor was occupied by a private family, that no one moved in or out during the period, and that she never heard of the said Wong Quock Bun.

F. The alleged husband testifies that the third floor of the building, or the one on which they lived, was the top of said building, there being nothing but the roof above; that there was an outlet from his rooms to said roof, reached by means of a permanent stepladder; whereas the applicant stated there was a fourth floor to the building, occupied by a private family whose name she did not know; also that there was a stairway leading from the third to the fourth floor.

G. The alleged husband says that in their home on the third floor at No. 20 Wah Hing St., they had a metal case clock resting on the table

in their parlor; while the applicant states that the only clock they had was a large wooden one which hung on the wall in that room.

It appears to the Bureau that the most of the discrepancies in the testimony of this applicant and her alleged husband are important and material to the point as to whether or not they are husband and wife and have ever lived together at all. For instance, regarding the visit of an alleged adopted son, the statements made by the applicant are in hopeless confusion and entirely at variance with those made by the alleged husband. In an explanatory affidavit the alleged husband says that his adopted son visited the apartments of his alleged wife but did not find her at home, and that he "*assumed*" that he made a second visit, and probably found her away on that occasion also. It should be noted, however, that this allegation is in direct contradiction of his first sworn statement, wherein he says that the boy made frequent visits to applicant's apartments. In view of the custom of the Chinese women to remain in seclusion, so strongly urged by counsel, it is rather strange that the boy should have found applicant away from home on all of his frequent visits. Again, these aliens claim to have lived in the same apartments for approximately seven months, yet they disagree as to the number and kind of clocks they had in their parlor; also as to the number of floors in the building, its structure and occupancy. It appears to the Bureau that these are matters upon which there should be no question after a residence together of seven months.

The evidence taken as a whole, does not establish, in the Bureau's judgment, that QUOCK SHEE is the wife of the man seeking to secure her admission. It is accordingly recommended that the excluding decision be affirmed.

(Signed) ALFRED HAMPTON,
HMc-HB Assistant Commissioner General.

Attorneys—RALSTON & RICHARDSON.

Approved:

(Signed) LOUIS F. POST,
Assistant Secretary."

It is true, as counsel suggests in his brief, that the finding and order of the Immigration officials must be based upon evidence. There can be no doubt but that the finding and order in the present case was based upon evidence and that the various discrepancies, to which the Court's attention has been called, were sufficient to justify the order of the Secretary of Labor. The Court will not as a rule inquire into the sufficiency of the probative facts or consider the reasons for the conclusions reached by the officers.

Healy vs. Backus, 221 Fed. 358, 365,

White vs. Gregory, 213 Fed. 768,

and unless there was a manifest abuse of discretion or unfairness on the part of the Immigration officials, the proceedings are not open to attack.

Low Wah Suey vs. Backus, 225 U. S. 460,
U. S. vs. Ju Toy, 198 U. S. 253; 49 L. Ed.
 1040,

Chin Yow vs. U. S. 208 U. S. 8, 52,

Tang Tun vs. Edsell, 223 U. S. 673,

and if the findings of the Secretary of Labor are based upon evidence and no unfairness is shown, they are final and conclusive.

Ekiu vs. U. S., 142 U. S. 651,

Lee Lung vs. Patterson, 186 U. S. 170,

The Japanese Immigrant case, 189 U. S., p 86,

Zakonaite vs. Wolf, 226 U. S. 272.

In *Lee Lung vs. Patterson*, *supra*, the Court said:

“It was decided in *Nishimura Ekiu’s* case that Congress might intrust to an executive officer the final determination of the facts upon which an alien’s right to land in the United States was made to depend, and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted or to controvert its sufficiency. This doctrine was affirmed in *Lem Moon Sing vs. U. S.*, 158 U. S. 538, 39 L. Ed. 1082; 15 Supt. Ct. Rep. 967 and at the present term in *Fok Young Yo vs. U. S.*, 185 U. S. 306.”

In *Low Wah Suey vs. Backus*, the Court said:

“A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair; that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. *U. S. vs. Ju Toy*, 198 U. S. 253; *Chin Yow vs. U. S.*, 208 U. S. 8, *Tang Tun vs. Edsell*, 223 U. S. 673.”

From the very nature of these cases the examination must be of a summary character.

Chin Yow vs. U. S. 208 U. S. 8,

Sibray vs. U. S., 227 Fed. 1,

and it is impossible, and in fact it was never contemplated by the framers of the Immigration law, that the formalities of procedure and the usual rules of evidence should govern these cases.

Ex parte Garcia, 205 Fed. 53,

Fong Yue Tung vs. U. S., 149 U. S. 698.

Counsel also makes a point of the refusal of the Immigration officials to permit applicant and her alleged husband to be re-examined. This point can

be answered by referring to a letter written on September 26, 1916, by the Acting Commissioner of Immigration at Angel Island to Messrs. McGowan and Worley, the attorneys representing the said applicant; said letter is as follows:

“Replying to your communications of the 23rd and 25th instant, *in re* Quock Shee, alleged wife of a merchant, ex SS ‘Nippon Maru’ September 1, 1916, you are advised that your request for reopening in this case, contained in the letter first above-mentioned, must be denied for the reason that there is no apparent ground for the assumption that any contradictory statements appearing in the record were due to a misunderstanding of the questions propounded, and that the affidavit of the alleged husband is not ‘new evidence’ within the meaning of the regulations.

The request contained in the second above-mentioned letter, that you, as counsel, and the alleged husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal, must also be denied, there being no authority in either the law or regulations for the granting of such a request.

Respectfully,

WHW/ASH

Acting Commissioner.”

It can readily be observed that if applicants were permitted to be re-examined in order to clear up discrepancies in their testimony, there would be no

end to the difficulties confronted by the Immigration officials. In fact, it would be an extraordinary case where aliens, after having an opportunity to discover the discrepancies in their testimony, could not give an explanation which would apparently be satisfactory but which might, and probably would, be wholly the result of a "frame-up" on their part.

A careful investigation of the record in this case, as contained in Exhibit "A", will show that the investigation was conducted fairly and impartially on the part of the Immigration officials, and that the Secretary of Labor was guided solely by said evidence in making his decision and in the absence of a showing of fraud on the part of the Immigration officials in making their investigation their finding and order should not be disturbed.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. U. S. Attorney.
Attorneys for Appellee.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

Appellant,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong, for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

PETITION FOR A REHEARING ON BEHALF
OF APPELLANT.

Filed

AUG 28 1917

DION R. HOLIF, D. Monckton,
Chronicle Building, San Francisco, Clerk.

ROY A. BRONSON,
Hearst Building, San Francisco,
*Attorneys for Appellant
and Petitioner.*

Filed this.....day of August, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



No. 2926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHEW HOY QUONG,

VS.

Appellant,

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

In the Matter of the Application of Chew Hoy Quong, for a Writ of Habeas Corpus for and on behalf of his wife, Quok Shee.

PETITION FOR A REHEARING ON BEHALF OF APPELLANT.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

A rehearing is respectfully prayed in the above entitled cause for the purpose of enabling counsel to direct the attention of the court to a matter presented at the argument which was overlooked in the decision herein.

Your petitioner respectfully calls the court's attention to the fact that the same point is involved in this case as was involved in the case of Mah Shee v. White, No. 2946, decided by this court on June 25, 1917, in which case the said point was determined in favor of the petitioner and appellant Mah Shee.

The point referred to and decided in the said Mah Shee case, but overlooked in this cause, is: that after counsel has filed his notice of appeal from the decision of the Commissioner of Immigration to the Secretary of Labor he has the right to interview the applicant, as a basis for the introduction of further evidence in support of said applicant's appeal and that to deny counsel an opportunity for such an interview is a denial of a full and fair hearing according to the law and regulations of the department.

In the case now before your honors, a rehearing of which is respectfully asked, the same identical proceedings were had before the immigration authorities as were had in the said Mar Shee case. In fact the letters from the acting commissioner denying counsel the right to interview the applicant in each case are almost *verbatim*.

On September 25th after notice of appeal had been filed to the Secretary of Labor and after counsel had requested an interview with the applicant the acting commissioner responded thereto as follows:

“The request * * * that you *as counsel* and the alleged husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal, must also be denied, there being no authority in either the law or regulations for the granting of such a request.”

(Page 50 of Record.)

Thus it is clear that the same point appears in this case as was decided in favor of petitioner in the Mah Shee case. In fact these two cases were handled simultaneously and by the same counsel before the immigration officials and were considered in conjunction on appeal to the Secretary of Labor.

(See letter, page 53 of Record.)

The only difficulty therefore is: was the point presented to the consideration of this court in briefs or on oral argument?

At the time of submission of this cause after oral argument on May 28, 1917, Dion R. Holm, who argued the cause for appellant, asked permission of this court that the opening brief of George McGowan, Esq., in the case of Mah Shee, No. 2946, on appeal to this court, be considered as a part of appellant's brief herein, in so far as it touched upon the contention that the detained was held “incomunicado” at the immigration station, counsel stating that the same point was involved herein as was involved in the Mah Shee case in that regard. He further made reference to the fact that the letter denying counsel the right to interview the

detained was set out at length in the brief of counsel for the government and that appellant at this time desired to avail himself of the point.

The court through the presiding judge after the request was made stated that it was so ordered. Through some inadvertence, however, the order does not appear in the minutes of the court.

The above is covered by the affidavit of Dion R. Holm hereunto annexed and made a part hereof and marked "Exhibit A".

The point therefore was not waived or abandoned but was actually insisted upon by appellant.

The point is raised in the original petition for the writ in the District Court, in so far as it is covered by the general allegation that the detained was denied a *full and fair hearing* by the immigration officials. And furthermore, the original record of the proceedings upon the face of which the point appears was made a part of the petition for the writ by order of court at time of the hearing of the order to show cause.

(Transcript, pp. 11-12.)

We respectfully submit therefore that a rehearing should be granted in this cause for the purpose of considering the point overlooked in the court's decision that the detained was denied a full and fair hearing before the immigration officials by reason of the fact that she was held "incommunicado" and refused the right to confer with her

counsel for the purpose of submitting further evidence in support of her appeal.

Dated, San Francisco,
August 25, 1917.

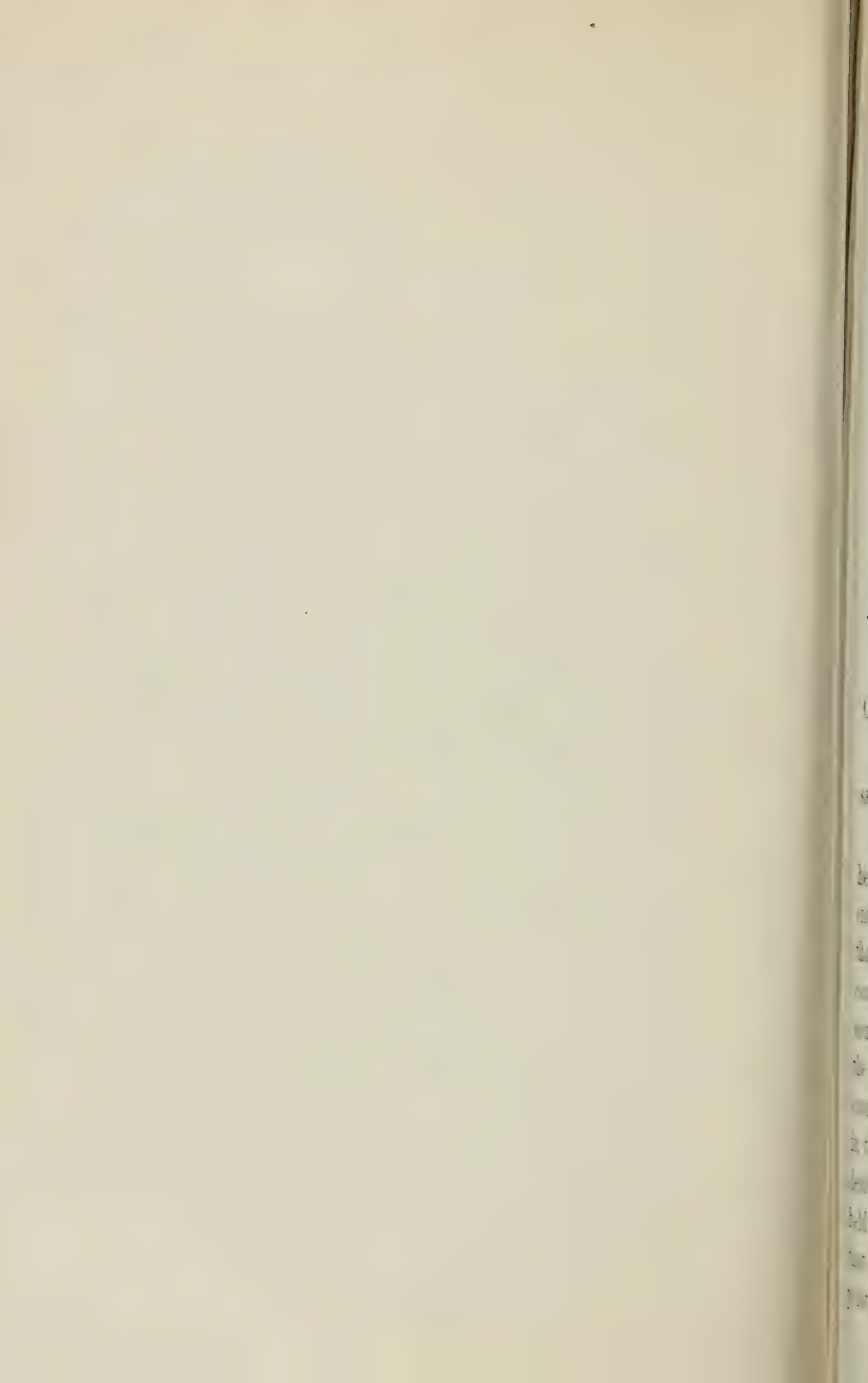
DION R. HOLM,
ROY A. BRONSON,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

DION R. HOLM,
*Of Counsel for Appellant
and Petitioner.*

(APPENDIX FOLLOWS.)



APPENDIX.

EXHIBIT A.

No. 2926

Chew Hoy Quong,

Appellant,

vs.

Edward White as Commissioner of
Immigration at the Port of San
Francisco,

Appellee.

State of California,
City and County of San Francisco.—ss.

Dion R. Holm, being duly sworn deposes and
says:

That he is one of the attorneys for appellant herein; that on May 28th, 1917, he argued the above entitled cause orally before the above entitled court; that prior to the submission of said cause to said court for its decision he asked permission of said court that the brief of George McGowan, Esq., in the case of Mah Shee, No. 2946, on appeal to said court, be considered as a part of appellant's brief in the above entitled cause in so far as said brief dealt with the contention that the detained was held "incommunicado" at the Immigration Station; that he further stated to the court that the same point was involved in the above entitled case as

was involved in said case of Mah Shee v. White, No. 2946, and that appellant desired to avail herself of said point; that he further stated that counsel for respondent had touched upon the point in his reply brief although appellant's opening brief had made no reference to it and that appellant desired to cover the contention by considering the said brief in the said Mah Shee case as a portion of the brief already filed herein; that the said court in answer thereto, speaking through the Honorable William B. Gilbert stated that it was so ordered; that the matter was thereupon submitted to said court for its decision.

DION R. HOLM.

Subscribed and sworn to before me this 27 day of August, 1917.

(Seal)

JULIA W. CRUM,

Notary Public in and for the City and
County of San Francisco, State of
California.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WALTER B. MITCHELL,

Appellant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND,
Appellees.

Transcript of Record.

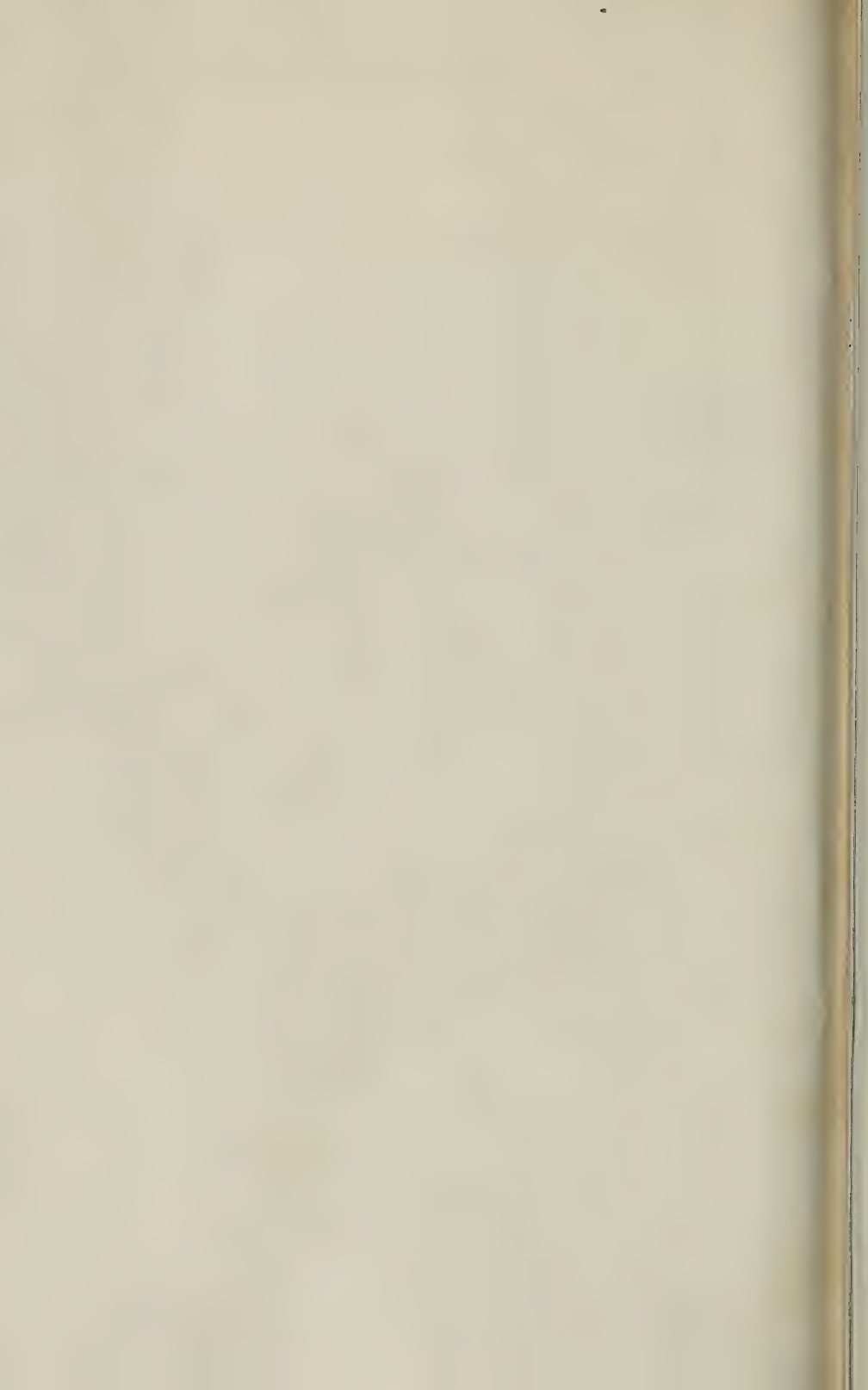
Upon Appeal from the United States District Court for the
District of Montana.

Filed

AUG 16 1917

F. D. Monckton,

Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

WALTER B. MITCHELL,

Appellant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

WALTER B. MITCHELL, Esq., of Spokane,
Washington,

Attorney for Plaintiff and Appellant.

C. B. NOLAN, Esq., of Helena, Montana, and
FRED L. GIBSON, Esq., of Livingston,
Montana,

Attorneys for Defendants and Appellees.

[1*]

*In the District Court of the United States, in and for
the District of Montana.*

No. 56—IN EQUITY.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Corporation, and
FRANK LIND, Pres., and THEODORE
LELAND, Sec. of said Corporation,

Defendants.

BE IT REMEMBERED, that on May 24, 1915,
the plaintiff filed his bill of complaint herein, in the
words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript
of Record.

*In the District Court of the United States, in and for
the 4th Division of the State of Montana.*

No. —.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Corporation, and
FRANK LIND, Pres., and THEODORE
LELAND, Sec. of said Corporation,
Defendants.

Bill of Complaint.

Comes now the plaintiff and for cause of action
alleges:

I.

That the plaintiff, Walter B. Mitchell, is a resident of the State of Washington, and located and doing business in the city of Spokane. And the defendant, The Leland Company, is a corporation duly organized and existing by virtue of the laws of the State of Montana, with their principal place of business at Gardiner, Montana. And the defendant Frank Lind is the president of said corporation, and the defendant Theodore Leland is the secretary of said corporation, and both of them reside at Gardiner, Montana, and are residents of the State of Montana.

II.

That this is a suit brought by the plaintiff, who is a citizen and resident of the State of Washington, against the defendants, who are at the time of the starting of this suit citizens and residents of the

State of Montana, residing in Park County and in the jurisdiction of the 4th division of this court, in said State of Montana, for the purpose of forcing the said defendant corporation and its officers to transfer 50 shares of stock of said corporation of a value of, to wit, \$5,000.00 upon the books of said corporation.

III.

That the said corporation, defendant herein, was at all times herein mentioned so incorporated and licensed by the State of Montana to do business and authorized to issue stock in said [3] corporation to the value of \$20,000 dollars, divided into 200 shares at a par value of \$100 per share, and pursuant to said authorization and the by-laws of the said corporation, Leland Company, the said corporation, issued a certificate of stock to one S. O. Leland, on the 20th day of Sept., 1911, fully paid up and duly signed and sealed with the corporate seal, and being certificate No. 1, for fifty shares of the capital stock of the said authorized issue of 200 shares, or one-fourth interest in said corporation's property, a copy of which certificate is in words and figures as follows:

Incorporated Under the Laws of the State of
Montana.

Number	Shares
1.	50.

THE LELAND COMPANY.

Capital Stock \$20,000.00.

This certifies that S. O. Leland is the owner of

Fifty shares of One Hundred Dollars each of the Capital Stock of the Leland Company. Shares \$100 each.

Transferable only on the books of the corporation in person or by Attorney on surrender of this certificate.

In witness whereof the duly authorized officers have hereunto subscribed their names and caused the corporate seal to be hereto affixed. This 20th day of Sept., A. D. 1911.

[Seal]	FRANK LIND,	S. O. LELAND,
	Secretary.	President.
		Shares \$100 each.

That upon the back of said certificate the following is set forth in words and figures as follows:

“Certificate for 50 shares of the Capital stock of the Leland Company issued to S. O. Leland, dated Sept. 20, 1911. Notice: The signature of this assignment must correspond with the name written upon the face of the certificate in every particular without alterations or enlargement or change whatever.

For value received I hereby sell, transfer and assign to E. C. Murphy the shares of stock within mentioned and hereby authorize to make the necessary transfer on the books of the Corporation.

Witness — hand and seal this sixth day of March, 1912.

S. O. LELAND.”

IV.

That the plaintiff became the owner and holder of said stock on the 6th day of April, 1913, and has ever

since and now is the owner and holder of said certificate of stock heretofore set forth herein, and entitled to have the same transferred upon the books of the corporation defendant herein. [4]

V.

That the plaintiff has made frequent demands upon the said defendants corporation for the transfer of said stock and have received no reply whatsoever and finally on the 29th day of Nov., 1914, the plaintiff through his authorized agent presented the said stock together with the proper assignments hereof to the said corporation at its office in Gardiner, Montana, and demanded that it be transferred upon the books of the corporation in the name of the plaintiff, and the defendants through its officers refused to so transfer the same and still refuses to transfer the same to injury and damages of the plaintiff in the value of said stock and in the dividends of the same.

VI.

That the value of said stock at the present time and at the time of the demand upon the said corporation for the transfer thereof is and was the sum of \$5,000.

WHEREFORE, plaintiff prays that an order be made directed to the defendants The Leland Company and to its officers, Frank Lind and Theodore Leland, compelling the said defendants to issue to the plaintiff herein a certificate of stock for fifty shares of the capital stock of the said corporation, and to place his name upon the books of said cor-

poration upon the surrender of the old certificate to the defendants.

2. That should it be impossible to obtain said issue of the fifty shares, then and in that case the plaintiff prays that judgment may be entered against the defendants and each of them for the sum of \$5,000, the value thereof, with interest from the time of the conversion of said stock by the said corporation.

3. Plaintiff prays for general and such further relief that may be just and equitable to this court in such cases made and provided.

WALTER B. MITCHELL,

In Pro. Per.

State of Washington,
County of Spokane,—ss.

W. B. Mitchell, being first duly sworn, on oath deposes and says: That he is the plaintiff in the foregoing bill of complaint, has read the foregoing complaint and knows the contents thereof, and swears the same to be true as he verily believes.

WALTER B. MITCHELL.

Subscribed and sworn to before me this 22 day of
May, 1915. [5]

[Seal]

JOHN E. ORR,

Notary Public in and for the State of Wash., Residing at Spokane.

Filed May 24, 1915. Geo. W. Sproule, Clerk. [6]

Thereafter, on July 22, 1915, the Answer of defendants was duly filed herein, in the words and figures following, to wit: [7]

In the District Court of the United States, District of Montana.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Corporation, and
FRANK LIND, President, and THEODORE
LELAND, Sec. of said Corporation,

Defendants.

Answer.

Now come the defendants above named, and for answer to plaintiff's bill of complaint, admit, allege and deny as follows:

I.

Admit the allegations of paragraphs I, II, III and V.

II.

Deny the allegations of paragraphs IV and VI.

WHEREFORE having fully answered said bill of complaint, defendants ask that said bill of complaint be dismissed, and that they have judgment for costs against the plaintiff, or such other relief as may be just in the premises.

FRED L. GIBSON,

C. B. NOLAN,

Solicitors and Counsel for Defendants.

Filed July 22, 1915. Geo. W. Sproule, Clerk. [8]

Thereafter, on Oct. 13, 1915, a stipulation allowing an amendment to the bill of complaint and an amended bill of complaint were duly filed herein, in the words and figures following, to wit: [9]

In the District Court of the United States, in and for the 4th Division of the State of Montana.

No. —.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

Stipulation Allowing Amendment to Bill of Complaint.

It is hereby stipulated by and between the parties herein by their respective attorneys that the plaintiff may amend his bill of complaint without first obtaining an order of the Court, and file and serve the same in said cause.

Dated this the 23d Sept., 1915.

W. B. MITCHELL,

In Pro. Per.

FRED L. GIBSON,

C. B. NOLAN,

Attorneys for Defendants. [10]

*In the District Court of the United States, in and for
the 4th Division of the State of Montana.*

No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Corporation, and
FRANK LINN, Pres., and THEODORE
LELAND, Secretary of said Corporation,
Defendants.

Amended Bill of Complaint.

Comes now the plaintiff and for cause of action
alleges:

I.

That the plaintiff, Walter B. Mitchell, is a resident
of the State of Washington, and located and doing
business in the city of Spokane; and the defendant
the Leland Company is a corporation duly organized
and existing by virtue of the laws of the State of
Montana, with their principal place of business at
Gardiner, Montana; and the defendant Theodore
Leland is the secretary of said corporation and the
defendant Frank Linn is the president, and both
reside at Gardiner, Montana, and are residents of the
State of Montana.

II.

That this is a suit brought by the plaintiff, who is
a citizen and resident of the State of Washington,
against the defendants, who are at the time of start-

ing of this suit citizens and residents of the State of Montana, residing in Park County and in the jurisdiction of the 4th division of this court, in said State of Montana, for the purpose of recovering the value of 50 shares of stock of the aforesaid corporation, which was converted by the defendant corporation and which at the time of said conversion was worth the sum of \$5,000.

III.

That the said corporation was at all times herein mentioned so incorporated and licensed by the State of Montana to do business and authorized to issue stock in said corporation to the value of \$20,000 dollars, divided into 200 shares at a par value of \$100 per share, and *pursuance* to said authorization and by-laws of the said corporation, the Leland Company, the said corporation issued [11] a certificate of stock to one S. O. Leland, on the 20th day of Sept., 1911, fully paid up and duly signed and sealed with the corporate seal, and being certificate No. 1 for fifty shares of the capital stock of the said corporation's property, a copy of which certificate is in words and figures as follows:

Incorporated Under the Laws of the State of
Montana.

Number

Shares

1.

50.

THE LELAND COMPANY.

Capital Stock \$20,000.00.

This certifies that S. O. Leland is the owner of
Fifty Shares of One Hundred Dollars each of the

Capital Stock of the Leland Company; shares \$100.00 each.

Transferable only on the books of the corporation in person or by attorney on surrender of this certificate.

In witness whereof the duly authorized officers have hereunto subscribed their names and caused the corporate seal to be hereto affixed. This 20th day of Sept., A. D. 1911.

[Seal] FRANK LINN, S. O. LELAND,
Secretary. President.

Shares \$100 each.

That upon the back of said certificate the following is set forth in words and figures as follows:

“Certificate for 50 shares of the Capital stock of the Leland Company issued to S. O. Leland, dated Sept. 20, 1911. Notice: The signature of this assignment must correspond with the name written upon the face of the certificate in every particular without alteration or enlargement or change whatsoever.

For value received I hereby sell, transfer and assign to E. C. Murphy the shares of stock within mentioned and hereby authorize to make the necessary transfer on the books of the corporation.

Witness hand and seal this six day of March, 1912.

S. O. LELAND.”

IV.

That said certificate was again duly assigned by E. C. Murphy to A. Coolin and by him duly assigned

to the plaintiff, who is now the owner and holder of said certificate and entitled to have the same transferred upon the books of the corporation, and has been the owner of said certificate since the 5th day of June, 1913.

V.

That the plaintiff on the 17th of May, 1913, caused notice to be given the defendant the Leland Company on behalf of his assignor to transfer the said stock upon the books of the company, and was refused the transfer by the corporation and its officers and again made a formal demand through an agent of the assignor on the 2d day of June, 1913, and the said defendants refused to transfer said stock, and the plaintiff has since made demands upon the [12] corporation and presented the said certificate with proper assignments, etc., and the said corporation refused to transfer said stock and still refused to so transfer said stock to the damage of the plaintiff in the sum of \$5,000, and interest from the 2d of June, 1913, being the value of said stock at the time of the conversion thereof.

VI.

That the value of said stock at the time of the conversion thereof by the corporation was and now is the sum of \$5,000.

WHEREFORE, plaintiff prays judgment against the Leland Company, a corporation, in the sum of \$5,000 for the conversion of said stock, together with interest thereon from the 2d day of June, 1913, and costs and disbursements herein; and for such other

and further relief as to this Court seems proper.

WALTER B. MITCHELL,

In Pro. Per.

State of Washington,

County of Spokane,—ss.

Walter B. Mitchell, being first duly sworn, on oath deposes and says that he is the plaintiff herein and has read the foregoing bill of complaint and swears the same to be true as he verily believes.

WALTER B. MITCHELL.

Subscribed and sworn to before me this the 11th day of Oct., 1915.

[Seal]

JOHN E. ORR,

Notary Public in and for the State of Washington,
Residing at Spokane.

Filed Oct. 13, 1915. Geo. W. Sproule, Clerk. [13]

Thereafter on Oct. 21, 1915, an answer to the amended bill was duly filed herein, in the words and figures following, to wit: [14]

*In the District Court of the United States, in and for
the 4th Division of the State of Montana.*

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Corporation, and
FRANK LIND, Pres., and THEODORE
LELAND, Sec. of said Corporation,

Defendants.

Answer to Amended Bill of Complaint.

The defendants now make answer to the amended bill of complaint of the plaintiff on file herein and for such answer admit, deny and allege as follows:

I.

The defendants admit the allegations of paragraph one of the said amended bill of complaint.

II.

The defendants admit that the plaintiff herein is a resident of the State of Washington and that the defendants are citizens and residents of the State of Montana and reside within the territorial jurisdiction of the Fourth Division of this court in said State of Montana. The defendants further admit that the amended bill of complaint is filed for the purpose of recovering the value of fifty (50) shares of stock of the said corporation, the Leland Company, alleged to have been converted by the defendant corporation. The defendants deny each and every allegation in paragraph two of said amended bill of complaint contained not herein specifically admitted.

III.

Defendants admit the allegations of paragraph three of the amended bill of complaint. [15]

IV.

The defendants deny that plaintiff is the owner of said certificate of stock for fifty shares of the capital stock of said corporation and deny that the plaintiff is the owner of any stock in said corporation and in

respect to the allegations of paragraph four of said amended bill of complaint, the defendants allege: That on the sixth day of March, 1912, one S. O. Leland was the owner of fifty shares of the capital stock of said corporation, The Leland Company, the ownership of which was evidenced by certificate No. 1, of said corporation, which is the certificate of stock mentioned and a copy of which is set forth in paragraph three of the amended bill of complaint. That on the last-named date the said S. O. Leland transferred said fifty shares of stock in said corporation to one E. C. Murphy and thereupon executed the assignment thereof upon the back of said certificate as set forth in said paragraph three of the amended bill of complaint in consideration for the transfer to him by the said Murphy of certain real and personal property. That thereafter and on or about the first day of May, 1912, the said S. O. Leland and said E. C. Murphy by a mutual agreement rescinded, abrogated and annulled the said contract and agreement entered into between them on the sixth day of March, 1912, for the transfer and exchange of said fifty shares of stock in said corporation, by the said S. O. Leland to the said Murphy for certain real and personal property, and that from and after the said first day of May, 1912, the said S. O. Leland again became the owner of the said fifty shares of stock in said corporation and the certificate above mentioned evidencing the ownership thereof, and that from and after said first day of May, 1912, the said E. C. Murphy had no right, title or interest in said fifty shares

[16] of stock nor in the certificate of stock above mentioned. Defendants further aver that they are informed and believe and therefore allege the fact to be that after the first day of May, 1912, and prior to May 17th, 1913, the said E. C. Murphy pretended and attempted to transfer the said certificate of stock above mentioned by a purported and attempted assignment thereof to one A. Coolin, and that thereafter and between the first day of May, 1912, and the 17th day of May, 1913, the said A. Coolin by an attempted and purported assignment thereof did attempt and pretend to assign said certificate of stock to the plaintiff herein. The defendants further aver that at the time of the said attempted and purported assignment or transfer of said certificate of stock by the said E. C. Murphy to the said A. Coolin, the said E. C. Murphy was not the owner of the said fifty shares of stock in said corporation and was not the owner of said certificate of stock hereinabove mentioned and had no right, title or interest in the same and was not entitled to the possession thereof; and that at the time of the said attempted and pretended assignment thereof by the said A. Coolin to this plaintiff, the said A. Coolin had no right, title or interest in or to said certificate of stock nor the fifty shares of stock in said corporation in said certificate mentioned and that the said A. Coolin was not the owner of nor entitled to the possession of said shares of stock or the said certificate of stock at the time of the attempted transfer by him to this plaintiff or at any other time or at all.

The plaintiffs further allege that at all times from

and after the first day of May, 1912, until on or about the 1st day of May, 1913, the said S. O. Leland was the owner of and entitled to the possession of [17] the said certificate of stock and the shares of stock therein mentioned, and that on or about the said last-named date the said S. O. Leland procured from this defendant corporation the issuance of a certificate of stock for the said fifty shares of stock then owned by him in said corporation in lieu of the certificate hereinabove mentioned, and thereafter on or about said last-named date sold, assigned and transferred the same to Theodore Leland, one of the defendants herein named, who is now and at all times since said last named date has been the owner of the said fifty shares of stock. Defendants particularly deny that plaintiff is the owner of the fifty shares of stock hereinabove mentioned or is the owner of said certificate of stock, and deny each and every allegation in paragraph four of the amended bill of complaint.

V.

The defendants admit that the defendant corporation was notified on May 17th, 1913, to transfer said stock upon the books of the company to plaintiff's said assignor, A. Coolin, and admit that defendant corporation thereupon at that time refused to transfer said stock as requested and have at all times since refused to transfer said stock to plaintiff. Defendants deny each and every allegation, matter and thing in paragraph five of the amended bill of complaint not herein specifically admitted.

VI.

The defendants deny the allegations of paragraph six of the amended bill of complaint.

VII.

For a second, separate and further defense to said amended bill of complaint the defendants allege:

[18]

I.

That the cause of action stated in the amended bill of complaint of the plaintiff herein is barred by the provisions of subdivision three of Section 6449 of the Revised Codes of the State of Montana 1907.

WHEREFORE, having fully answered said amended bill of complaint, defendants ask that same be dismissed and that they have judgment for costs herein and have such other, further or different relief as to the court may seem meet and proper.

FRED L. GIBSON,

Livingston, Montana,

C. B. NOLAN,

Helena, Montana,

Solicitors and Counsel for Defendants. [19]

State of Montana,

County of Park,—ss.

Fred L. Gibson, being first duly sworn, on oath says: I am one of the solicitors and counsel for the defendants in the above-entitled action and make this affidavit for and on behalf of the defendants for the reason that none of the officers of said defendant corporation, The Leland Company, are able to verify this answer by reason of the fact that they are detained in Gardiner, Montana, which is distant

from Livingston, Montana, fifty-five miles, and that none of the said defendants can verify said answer by reason of the fact that they are detained by business at Gardiner, Montana, and cannot come to Livingston to verify the answer herein, which is prepared in the office of said affiant at Livingston, Montana.

Affiant further says: I have read the foregoing answer and know the contents thereof and the same is true to the best of my information, knowledge and belief.

FRED L. GIBSON.

Subscribed and sworn to before me this 20th day of October, 1915.

[L. S.]

ELBERT F. ALLEN,

Notary Public for the State of Montana, Residing at Livingston, Montana.

My Commission expires Sept. 6th, 1918.

Filed Oct. 21, 1915. Geo. W. Sproule, Clerk. [20]

Thereafter, on October 29, 1915, reply was duly filed herein in the words and figures following, to wit: [21]

In the District Court of the United States, in and for the 4th Division of the State of Montana.

No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Corporation, et al.
Defendants.

Plaintiff's Reply to the Answer of the Defendants.

Comes now the plaintiff and for reply to the defendants' answer denies, admits and alleges as follows:

I.

Admits the facts set forth in the first 19 lines of the fourth paragraph of defendants' answer to the words "That thereafter," and admits that there was an agreement for the return of said stock to S. O. Leland upon certain terms and conditions, and that upon complying with those terms the said S. O. Leland was to have the said stock back, but deny that the said S. O. Leland complied with said conditions, and allege that upon the failure of the said S. O. Leland to comply with said conditions suit was brought by John Murphy, assignee of E. C. Murphy in said agreement of May 1st, 1912, against S. O. Leland and Amelia Leland in the Superior Court of Spokane County, State of Washington, and the said S. O. Leland and Amelia Leland, being personally served with summons in said cause on the 8th day of March, 1913, and judgment was obtained against the said S. O. Leland and Amelia Leland on the 8th day of April, 1913, and the rights, titles and interest of S. O. Leland and Amelia Leland in and to said certificate of stock No. 1 for fifty shares of the capital stock was sold to satisfy said judgment at sheriff sale to the highest bidder, and A. Coolin there and then became the owner and holder of said certificate; that thereafter and on the 21st of May,

1913, A. Coolin obtained an assignment from E. C. Murphy of said stock for the purpose of clearing up any rights or interest that E. C. Murphy had in said stock, and on the 5th day of June, 1913, the said A. Coolin assigned all the rights, titles and interest to the plaintiff herein, and there and then turned over to the plaintiff the said certificate, and the plaintiff ever since has owned and been in possession and the holder of said certificate; and there has been no appeal taken [22] from any of the proceedings by S. O. Leland and the time for appeal has long since elapsed; plaintiff further denies each and every allegation, matter and thing contained in paragraph four of the defendants' answer except what is specifically admitted herein, and as to the last part of said paragraph the plaintiff has heard that a new certificate was issued to S. O. Leland without the return of the old certificate, but denies that such certificate is a valid certificate or that the said Theodore Leland obtained any right, title or interest in and to the stock of said corporation thereby.

And in reply to the second, separate and further defense of the defendants, denied that the claim set forth in the plaintiff's complaint is barred by section 6449, sub. 3 of the Revised Code of Montana, or, by any other section of said code or at all.

WHEREFORE the plaintiff having answered the affirmative allegation of the defendants' answer fully, prays that notwithstanding the same he is entitled to the relief prayed for in the amended complaint herein.

WALTER B. MITCHELL,
Attorney for Plaintiff.

State of Washington,
County of Spokane,—ss.

Walter B. Mitchell, being first duly sworn, on oath deposes and says that he is the plaintiff in the above-entitled cause and that he has read the foregoing reply and swears the same to be true to the best of his knowledge and belief.

WALTER B. MITCHELL.

Subscribed and sworn to before me this the 27th day of Oct., 1915.

[Seal]

GEO. S. CANFIELD,

Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

Filed Oct. 29, 1915. Geo. W. Sproule, Clerk. [23]

Thereafter, on Feb. 1, 1916, motion for judgment on the pleadings was made by defendants and by the Court denied, the minute entry thereof being in the words and figures following, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

No. 56.

WALTER B. MITCHELL

vs.

THE LELAND CO. et al.

**Minute Entry—February 1, 1916—Motion for
Judgment on Pleadings, etc.**

This cause came on regularly for trial at this time, the plaintiff appearing in his own behalf, and

F. L. Gibson, Esq., and C. B. Nolan, Esq., appearing as counsel for defendants.

Thereupon it was agreed in open court that trial by jury be waived and the cause tried to the court. Thereupon defendants moved for judgment on the pleadings, and thereupon motion argued and submitted, and after due consideration, motion denied and exception of defendants noted.

Thereupon ^{FRANK LIN} F. G. Leland sworn as a witness for plaintiff, and thereupon defendants objected to the introduction of any evidence at this time upon grounds stated to the Court, and thereupon after due consideration, objection overruled and exception noted. Thereupon ^S F. G. Leland was duly examined and testified as a witness for plaintiff, and Walter B. Mitchell sworn and examined as a witness for plaintiff, certain documentary evidence offered and admitted, and thereupon plaintiff rested. Thereupon Theodore Leland, ^S sworn and examined as a witness for defendants, ^S B. O. Leland recalled, and certain documentary evidence offered and admitted, and thereupon defendants rested. Thereupon plaintiff testified in rebuttal, and thereupon evidence being closed, further trial and argument of cause ordered continued until to-morrow morning at 10 o'clock.

Entered in open court February 1, 1916.

GEO. W. SPROULE,

Clerk. [24]

That on the 1st day of February, 1916, at the trial of said cause, certain exhibits were offered and admitted in evidence, being in the words and figures following, to wit: [25]

**Plaintiff's Exhibit No. 1—Letter Dated May 29, 1913,
A. Coolin to The Leland Company.**

May 29, 1913.

The Leland Company,
Gardiner, Montana.

Gentlemen:

Please take notice that the *writter* A. Coolin is the holder of a certificate of stock in your corporation and being certificate No. 1 for Fifty shares of the capital stock of your company and which was originally issued to S. O. Leland on the 20th day of Sept., 1911, signed by Frank Lind, sec., and S. O. Leland, Pres., and sealed with the corporate seal, and which was duly assigned by S. O. Leland on the back of said certificate on the sixth day of March, 1912, and at that time the said S. O. Leland made an affidavit before a notary public here in Spokane that it was free from all encumbrance, said assignment being made to E. C. Murphy who on the 17 day of march, 1912, notified your company of the assignment, and later the said S. O. Leland and E. C. Murphy entered into a contract whereby the said E. C. Murphy was to transfer the said Stock back to him in consideration of the said S. O. Leland paying a certain sum of money, and that is the reason that the stock was not sent on for transfer at

that time. That since that time the said S. O. Leland has persistently refused to pay said amount and suit was instituted here to compel the payment of the money and personal service was obtained on the said S. O. Leland and at the time of suit the said S. O. Leland was tendered the said stock on condition that he pay said money and thereupon he refused to pay and judgment resulted and the said stock was sold at auction sale to satisfy the said judgment and the writer purchased at such sale and holds the said stock and also the sheriff certificate of sale of said stock and had also obtained an assignment of the said shares from the said E. C. Murphy in writing so that there can be no rights claimed by the said E. C. Murphy and now therefore the said A. Coolin makes a formal demand on the said The Leland Company to transfer the said stock to himself on the books of said Leland Company and recognize the said A. Coolin as a stockholder of said [26] Leland Company and providing the said company will agree to transfer he will forward the said certificate for cancellation to his agent at Gardiener who will present the same to your company for transfer. I am sending a copy of this letter to Yegen Bros., bankers of your city, in order that I will get immediate reply, as I have been informed on the 15 & 17 of may, 1913, a few days after the purchase of said stock that the said S. O. Leland Had had a new certificate issued on the strength of an affidavit that he had lost the certificate in question and that your company would refuse to transfer without legal

process, and also My attorney has written your company without receiving any reply and thus this letter is written to give your company a chance to act and have evidence of the service on the said Leland Company. As I can say that the said S. O. Leland never lost said stock and only knew *to* well where the said certificate was and has deliberately made said affidavit for the purpose of avoiding his obligations and to say the least was not made in good faith and cannot in any way defeat the original certificate of Stock, and I intend to force this matter at once and unless I receive a favorable reply by return mail will bring action at once to determine this matter. Hoping that this may not be necessary I Remain,

Yours Truly,

A. COOLIN.

Filed and entered Feb. 1, 1916. Geo. W. Sproule,
Clerk. [27]

Plaintiff's Exhibit No. 2—Registry Return Receipt.

POST OFFICE DEPARTMENT

Penalty for private use to avoid

OFFICIAL BUSINESS

payment of postage \$300

ORIGINAL REG.

NO. 7300

Postmark of Delivering Office

RETURN TO

WALTER B. MITCHELL.

(Name of sender)

Street and Number,)

and Date of Delivery

or Post Office Box.) 201 Hutton Bldg.

SPOKANE,

WASHINGTON.

This card must be neatly and correctly made up and addressed at the postoffice where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, legibly postmarked, and mailed to the sender, without envelope or postage.

REGISTRY RETURN RECEIPT. Form 1548.

Received from the postmaster registered article, the original number of which appears on the reverse side of this card.

Date of delivery—6/2, 1913.

(To be filled in by person signing receipt)

When delivery is made to an agent	THE LELAND CO.
of the addressee, both addressee's	(Signature or name of addressee)
name and agent's signature must ap-	THEO. LELAND.
pear in this receipt.	(Signature of addressee's agent)

A registered article must not be delivered to anyone but the addressee or the person in whose care it is addressed, except upon addressee's written order or a written order from the sender transmitted by the mailing postmaster and duly verified.

When the above receipt has been promptly signed, it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

P. Ex. 2. Filed and entered Feb. 1, 1916. Geo. W. Sproule, Clerk. By _____, Deputy Clerk.
[28]

**Plaintiff's Exhibit No. 3—Letter Dated April 17,
1913, Walter B. Mitchell to The Leland Company.**

WALTER B. MITCHELL,

Attorney at Law.

Bell Phone Main 2101.

Home Phone A-2282.

510 Hutton Building,

Spokane, Washington.

April 17, 1913.

The Leland Company,

Gradiner, Mont.

Gentlemen:

A client of mien has in his possession a certificate of stock issued by your company being certificate Number (1) for fifty shares at par value of One Hundred Dollars per share issued to S. O. Leland and signed by Frank Lind *Sectary* and S. O. Leland President date of issue being the 20th day of Sept. 1911, and which stock was assigned to my client in march 6, 1912, but has never been transferred on the books of the company and I would like to inquire whether this transaction still shows there is this certificate out in the name of S. O. Leland and if so what is necessary to do in order to have the same issued to my client and what the value of the said stock is at the present time. Hoping to hear soon I remain.

Yours truly.

Filed and entered Feb. 1, 1916. Geo. W. Sproule,
Clerk. By —————, Deputy Clerk. [29]

**Plaintiff's Exhibit No. 5—Certificate for Fifty
Shares of Capital Stock of The Leland Company.**

Incorporated Under the Laws of the State of Montana.

Number	Shares.
1	50

THE LELAND COMPANY.

Capital Stock \$20,000.00.

This Certifies That S. O. Leland is the owner of Fifty Shares of One Hundred Dollars each of the Capital Stock of The Leland Company transferable only on the Books of the Corporation in person or by Attorney on surrender of this Certificate.

Shares \$100 each.

IN WITNESS WHEREOF the duly authorized officers of the Corporation have hereunto subscribed their names and caused the corporate Seal to be here-to affixed this 20th day of Sept., A. D. 1911.

(Corporate Seal)

FRANK LIND,

Secretary.

S. O. LELAND,

President.

Shares \$100 each.

CERTIFICATE

for

50

Shares

of the

Capital Stock

of the

Leland Company.

Issued to S. O. Leland. Dated Sept. 20, 1911.

For value received I hereby sell, transfer and assign to E. C. Murphy the Shares of Stock within mentioned and hereby authorize _____ to make the necessary transfer on the Books of the Corporation.

Witness, — hand and seal this Sixth day of March, 1912.

S. O. LELAND.

Witnessed by

(No. 56. Filed and entered Feb. 1, 1916. Geo. W. Sproule, Clerk. By _____, Deputy Clerk.)
[30]

**Plaintiff's Exhibit No. 6—Assignment of Stock in
Leland Company from E. C. Murphy to A.
Coolin.**

In consideration of One dollar and other valuable consideration I hereby assign sell transfer and assign to A. Coolin of Spokane Wash all my rights titles and interest in and to the certificate of Stock in the Leland Company and being certificate No. 1 for Fifty shared of the Capitol Stock in the said Leland Compant a corporation of the State of Montana, and hereby authorize the said A. Coolin to have the same issued to himself upon the books of the company.

E. C. MURPHY.

Subscribed and sworn to before me this the 21st day of May, 1913.

[Notarial Seal] CLYDE H. THOMPSON,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

[Endorsed]: Filed and entered Feb. 1, 1916. Geo.
W. Sproule, Clerk. [31]

**Plaintiff's Exhibit No. 7—Agreement Dated June 5,
1913, Between A. Coolin and W. B. Mitchell.**

*In the District Court of the Sixth Judicial District
of the State of Montana, in and for the County
of Park.*

A. COOLIN,

Plaintiff,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LIND and THEODORE LELAND,
Defendants.

Assignment of Whatever may be Recovered Herein.

This agreement made this 5th day of June, 1913,
by and between A. Coolin of Spokane, Wash., as
party of the first part, and W. B. Mitchell, party of
the second part, Witnesseth:

That whereas the said party of the first part al-
lowed his name to be used for the purpose of bring-
ing suit on some Stock in the above said corporation
and said stock was bid in by said W. B. Mitchell in
the name of A. Coolin, for that purpose only, and the
first party has no interest whatsoever now or at the

time of the sale of said stock or has paid or is liable to pay anything for the assignment of said judgment to him, as the real party in interest in said assignment of said Judgment from John E. Murphy was the said W. B. Mitchell.

Now therefore in consideration of one dollar and other valuable consideration, the receipt whereof is hereby acknowledged by the party of the first part, in hand paid by the party of the second part, the said party of the first part hereby sells, assigns, transfers and sets over to the party of the second part all the rights, titles and interest in and to any judgments that may or could be obtained or recovered in the above entitled suit in the said courts of Montana or otherwise, in which the said party of the first part appears as plaintiff and the said Leland Company appears as defendants.

And the said party of the first part does further assigns, sell & transfer all the rights, titles and interest in and to a certain certificate of stock, and being certificate number (1) for fifty shares of stock of said Leland Company and dated the 20th of Sept., 1911, and also the sheriff's Bill of sale of said mentioned stock, to the party [32] of the second part, and hereby authorize said W. B. Mitchell to have the same placed on the books of said Leland Company in his name and stead, and to prosecute said suit or compromise as deemed best to himself, however at his own cost and expense, saving me harmless from any and all costs in said matter. And hereby give him full power and authority to sign my name to whatever papers that may be necessary to carry out

this suit and give receipt in my name and stead for any moneys that may be collected upon this suit or from the sale of said stock the same as I could if the present was not made.

A. COOLIN.

Signed in the presents of

A. ULBRIGHT.

MARY H. ULBRIGHT.

Filed and entered Feb. 1, 1916. Geo. W. Sproule,
Clerk. [33]

Plaintiff's Exhibit No. 8—Registry Return Receipt.

POST OFFICE DEPARTMENT

Penalty for Private use to avoid

OFFICIAL BUSINESS

payment of postage, \$300.

ORIGINAL REG.

NO. 1246

Postmark of Delivery Office

RETURN TO.

W. B. MITCHELL.

(Name of Sender)

Street and Number,)

and Date of Delivery

or Post Office Box.) 201 Hutton Bldg.

Post Office at Spokane

County ———, State of Wash.

This card must be neatly and correctly made up and addressed at the post office where the article is registered. The postmaster who delivers the registered article must see that this card is properly signed, legibly postmarked, and mailed to the sender, without envelope or postage.

REGISTRY RETURN RECEIPT. Form 1548.

Received from the postmaster registered article, the original number of which appears on the reverse side of this card.

Date of delivery—11/30, 1914.

(To be filled in by person signing receipt)

When delivery is made to an agent	YEGEN BROS. BKRS.
of the addressee, both addressee's	(Signature or name of addressee)
name and agent's signature must ap-	ST. JOHN, Cashier.
pear in this receipt.	(Signature of addressee's agent)

A registered article must not be delivered to anyone but the addressee or the person in whose care it is addressed, except upon addressee's written order from the sender transmitted by the mailing postmaster and duly verified.

When the above receipt has been properly signed, it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

P. Ex. 8. Filed and entered Feb. 1, 1916. Geo. W. Sproule, Clerk. By _____, Deputy Clerk.
[34]

Plaintiff's Exhibit No. 9—Letter Dated December 3, 1914, M. B. St. John to W. B. Mitchell.

YEGEN BROTHERS, BANKERS.

Transact a General Banking Business.

Gardiner, Mont., Dec. 3, 1914.

W. B. Mitchell, Esq.,
Spokane, Wash.

Dear Sir:

Yours of the 28th ult. to hand with enclosures as stated. In reply will say that we presented this stock to the Leland Co. for registration and same was refused. According to their books new stock was issued in place of this certificate for the reason

that same was lost or destroyed and affidavit to that effect is in possession of S. O. Leland, who is now residing in San Francisco, Calif.

The present officers of the company are Frank Lind President and Theodora Leland Secretary. As to the value of the stock that is very problematical as the company has never paid a dividend to our knowledge. We have known of $\frac{1}{4}$ of the stock to be offered as low as \$3000.00 and no buyers at that figure.

We are returning herewith all of the papers mentioned above and trust our action in the matter will prove satisfactory.

M. B. ST. JOHN,
Cashier.

Filed and entered Feb. 1, 1916. Geo. W. Sproule,
Clerk. [35]

**Plaintiff's Exhibit No. 10—Judgment-Roll in Cause
Entitled John E. Murphy vs. S. O. Leland et al.**

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

No. 41,258.

JOHN E. MURPHY,

Plaintiff,

vs.

S. O. LELAND and AMELIA LELAND,

Defendants.

Summons.

The State of Washington, to the Above-named S. O. Leland and Amelia Leland, His Wife, Defendants:

You and each of you are hereby summoned and required to be and appear in the above-entitled court and defend the above-entitled action in the court aforesaid, and answer the complaint of the plaintiff, and serve a copy of your answer or other pleading on the undersigned attorney for the plaintiff at his address below stated, within twenty days after service of this summons upon you, exclusive of the day of service; and in case of your failure to do so, you are hereby notified that judgment will be rendered against you according to the demand of the complaint with the clerk of said court, a copy of which is herewith served upon you and each of you.

W. B. MITCHELL,

Attorney for the Plaintiff.

P. O. Address 201 Hutton Building, Spokane, Wash. Tel. Main 1971. [36]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

No. 41,258.

JOHN E. MURPHY,

Plaintiff,

vs.

S. O. LELAND and AMELIA LELAND,

Defendants.

Complaint.

Comes now the plaintiff and for cause of action alleges as follows:

I.

That the defendants were at all time herein husband and wife and residents of the county of Spokane, Spokane, Wash., and that the property involved in this suit was purchased on behalf of the community.

II.

That on or about the 1st of May, 1912, the defendant, S. O. Leland, entered into a contract on behalf of the community with one E. C. Murphy, a copy of which is in words and figures as follows:

This agreement, made and entered into at Spokane, Washington, this —— day of May, 1912, by and between E. C. Murphy of Hillyard, Washington, the party of the first part, and S. O. Leland of Spokane, Washington, the party of the second part,

Witnesseth, that whereas, the said parties have heretofore made certain trades of property whereby the said party of the first part has heretofore deeded to the said party of the second part lot One (1) and west twenty (20) feet of lot two (2) in block thirty-nine (39) of Union Park Addition to Spokane, Washington, also the property known as the "south avenue Hotel" in Hillyard, Washington, and received therefore Fifty (50) shares of stock in the Leland Grocery Company, and whereas each of the said parties has a claim against the other growing out of said trades,

Now Therefore, for the purpose of adjusting said claims and making full settlement and satisfaction thereof and all differences existing between said parties, the said party of the first part does hereby sell to the said party of the second part a certain piano, located at No. 2404 East Sixth Avenue, for the sum of \$100.00 and agrees to transfer and deliver to the said party of the second part the said Fifty (50) shares of stock in the said Leland Grocery company, in consideration of which the said party of the second part does hereby agree to convey, by good and sufficient Quit claim deed, to the said party of the first part, the said lot one (1) and the west twenty (20) feet of lot two (2) in Block thirty-nine (39) in Union Park Addition, also the said South Avenue Hotel property in Hillyard, Washington, and further agrees, that in case it becomes necessary for the said party of the first part, his grantee or assigns, to bring suit to quiet title to the said south avenue hotel property in Hillyard, or the lots on which said hotel is now situated, that the said party of the second part will pay toward the expenses of such suit the sum of \$30.00, and in further consideration [37] of the covenants on the part of each of the said parties herein, each of the said parties does hereby release the other from all claims of every kind and nature, that each may have against the other, and does hereby acknowledge full satisfaction of all such claims.

The obligations of this contract shall extend to and be binding upon the heirs, personal representatives and assigns of both parties hereto.

In witness whereof, the said parties have hereunto subscribed their respective names the day and year first above written.

E. C. MURPHY.

S. O. LELAND.

For value received I hereby sell and assign the within contract to John E. Murphy. Dated June 20th, 1912.

E. C. MURPHY.

III.

That the above contract was duly assigned to the plaintiff on the 20th day of June, 1912, and that the contract was carried out except the payment of the \$100, which payment is long past due and the defendants has persistently refused to pay said amount as agreed or at all. That the piano mentioned in said contract was purchased for the benefit of the community.

IV.

That according to the terms of said contract in case of suit being brought to recover the said contract or enforcement thereof the defendants agreed to pay in addition the amount, thirty dollars, toward the expenses of said suit; that the said expense of said suit consists of the cost and a reasonable attorney fee of thirty dollars, and that thirty dollars is a reasonable attorney fee in said cause.

WHEREFORE, the plaintiff demands judgment in the sum of \$100 and interest from the 1st day of May, 1912, together with \$30, a reasonable attorney

fee, together with his costs and disbursements herein.

W. B. MITCHELL,
Attorney for the Plaintiff.

State of Wash.

County of Spokane,—ss.

W. B. Mitchell, being first duly sworn, on oath deposes and says: That he is the attorney for the plaintiff in the above-entitled cause, has read the foregoing complaint and swears the same to be true as he verily believes, and makes this affidavit on behalf of the plaintiff [38] for the reason that the plaintiff is not present and the facts are within the knowledge of this affiant.

W. B. MITCHELL.

Subscribed and sworn to before me this 7th day of March, 1913.

HORACE H. GUTH,
Notary Public in and for the State of Washington,
Residing at Spokane.

Filed Apr. 8, 1913, at 1:30 o'clock, P. M. Glenn B. Derbyshire, Clerk. Otto W. Bleimer, Deputy.
[39]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

No. —.

JOHN E. MURPHY,

Plaintiff,

vs.

S. O. LELAND and AMELIA LELAND,

Defendants.

Motion for Default.

Comes now the plaintiff in the above-entitled action, through his attorney W. B. Mitchell, and moves this Hon. Court for an order of default, against the defendants S. O. Leland and Amelia Leland, his wife, herein, for the reason that the said defendants have made no appearance in said cause and have neither served or filed any answer or other pleading in this case, though more than twenty days have elapsed since the defendants and each of them were served with process in this cause.

This motion is based upon the files and records of this court and the affidavit of W. B. Mitchell following.

W. B. MITCHELL,
Attorney for Plaintiff.

State of Washington,
County of Spokane,—ss.

W. B. Mitchell, being first duly sworn, on oath deposes and says: That he is attorney for the plaintiff in the above-entitled cause; that no pleadings of any kind have been served on him or any one representing the plaintiff in this action; and that more than twenty days have elapsed since the defendant S. O. Leland and Amelia Leland was served, as will more fully appear from the affidavit of service on file in said cause.

W. B. MITCHELL.

Subscribed and sworn to before me this, the 29th day of March, 1913.

JOHN E. ORR,
Notary Public in and for the State of Wash., Resid-
ing at Spokane.

Filed Apr. 8, 1913 at 1:30 o'clock P. M. Glenn B.
Derbyshire, Clerk. Otto W. Bleimer, Deputy. [40]

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

No. 41,258.

JOHN E. MURPHY

Plaintiff,

vs.

S. O. LELAND and AMELIA LELAND, His Wife,
Defendants.

Default.

In this action, S. O. Leland and Amelia Leland, his wife, defendants, having been regularly served with process in the county of Spokane, Spokane, Wash., and having failed to appear and answer the complaint of the plaintiff on file herein, the default of said defendants, S. O. Leland and Amelia Leland, his wife, is hereby entered according to law.

Attest my hand and seal at court this, the 8th day of April, 1913.

E. H. SULLIVAN,
Judge. [41]

COMPARED.

State of Washington,
County of Spokane,—ss.

Edmund C. Murphy, being first duly sworn, on oath deposes and says: That I am and was on the date herein mentioned a citizen of the United States, and of the State of Washington, over the age of 21 years and competent to be a witness in the within-entitled action, not being the plaintiff herein. That I served the within summons and complaint on Amelia Leland personally by delivering to her at her place of abode, a true copy of said summons and complaint and on served the defendant S. O. Leland, by delivering and leaving a true copy of the within summons and complaint with his wife, Jane Doe Leland, and also a defendant herein, at the abode of said defendants herein, in the city of Spokane, Washington, on the 8th day of March, 1913. Further this affiant saith not.

EDMUND C. MURPHY.

Subscribed and sworn to before me this, the 8 day of April, 1913.

CLYDE H. THOMPSON,

Notary Public in and for the State of Wash., Residing at Spokane, Wash.

Filed Apr. 8, 1913, at 1:30 o'clock P. M. Glenn B. Derbyshire, Clerk. Otto W. Bleimer, Deputy. [42]

No. 41,258.

*In the Superior Court of the State of Washington,
in and for the County of Spokane.*

JOHN E. MURPHY,

Plaintiff,

vs.

S. O. LELAND and AMELIA LELAND, His Wife,
Defendants.

Judgment.

This cause came on regularly for trial on the 8 day of Apr. 1913, before Hon. Sullivan, Judge, presiding, without a jury, a jury having been expressly waived, the plaintiff appearing by his attorney and personally and the defendants having defaulted and their default having heretofore been entered, and the Court being fully advised in the premises and having heretofore made and entered herein its findings of fact and conclusions of law,—

Now, therefore, it is ordered, adjudged and decreed, that the plaintiff recover of the defendants and each of them and the community composed of them the sum of \$105.50, together with \$17.00 costs and disbursements herein, and the plaintiff have judgment for the aforesaid amounts.

Done in open court this the 8 day of Apr., 1913.

E. H. SULLIVAN,
Judge.

Filed May 1, 1913, at 11.25 o'clock A. M. Glenn B. Derbyshire, Clerk. W. C. Steinmetz, Deputy.
[43]

I, John E. Murphy, for and in consideration of One Dollar and other valuable consideration, do hereby sell, assign and set over all my rights, titles and interest in and to a certain judgment rendered in my favor by the Superior Court on the 8 day of April, 1913, case No. 41,258, for the sum of \$105.50 and cost to A. Coolin, and hereby give the said A. Coolin full power and authority to enforce and collect the said Judgment the same as if I myself were present and in case of payment of said Judgment to satisfy the record in full for the same.

Dated this 30 day of April, 1913.

~~JOHN~~ E. MURPHY,

E. C. MURPHY,

Witness.

Filed May 12, 1913, at 10 o'clock A. M. Glenn B. Derbyshire, Clerk. E. E. Burton, Deputy. [44]

Sheriff's Return on Sale of Personal Property.

State of Washington,
County of Spokane,—ss.

I, Geo. E. Stone, Sheriff of Spokane County, Washington, do hereby certify that the annexed execution came into my hands on the 1st day of May, A. D. 1913, and by virtue of the same I did, on the 1st day of May, A. D. 1913, levy upon the personal property hereinafter described as follows, to wit: Certificate No. 1, for fifty (50) shares of the capital stock of the Leland Company, a corporation, of the State of Montana, and that I duly noticed said property, according to law, to be sold by me, at East

Door, Courthouse, in the City of Spokane, in said County and State, on the 12th day of May, A. D. 1913, at ten o'clock in the forenoon of said day. That previous to said sale I caused due and legal notice thereof to be posted in three of the most public places in said County and State, for the period of ten days immediately preceding such sale, and that on the 12th day of May, A. D. 1913, the day which said property was so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, and exposed the said property for sale by offering it at public auction, according to law, to the highest bidder, for cash in hand, having first given notice that said property was to be sold and sold the whole of the same in one separate parcel to A. Coolin, assignee of plaintiff, for the sum of One Hundred Twenty-six and 70/100 Dollars (\$126.70), said purchaser being the highest and best bidder, and said sum being the highest bid, in the aggregate, for the same; and I have given said purchaser a certificate of sale.

Dated at Spokane, this 12th day of May, A. D. 1913.

GEO. E. STONE,
Sheriff of Spokane County, Washington.

By W. A. Lothrop,
Deputy Sheriff. [45]

SHERIFF'S STATEMENT OF COSTS AND
FEES.

Suit No. 41,258.

JOHN E. MURPHY,

vs.

S. O. LELAND and AMELIA LELAND, his Wife.
State of Washington,
County of Spokane,—ss.

I, Geo., E. Stone, Sheriff of Spokane County,
Washington, do hereby certify that the within judg-
ment has this day been satisfied by the sale of the
within described personal property, as follows, to
wit:

Judgment	105.50
Interest from 4/8/13 to Sale, at per cent	.60
Clerk's Fees	17.00
Accrued Cost	
Sheriff's Fees	3.60
Publication	
Attorney Fee	

Total, \$126.70

Bid, \$126.70

Deficit—Surplus, \$ None

Dated this 12th day of May, 1913.

GEO. E. STONE,

Sheriff Spokane County, Washington.

By W. A. Lothrop,

Deputy.

Sheriff's Certificate of Posting.**JOHN E. MURPHY,**

vs.

S. O. LELAND, et ux.

I, Geo. E. Stone, Sheriff of Spokane County, certify: That on the 1st day of May, 1913, I posted notices of sale in above-entitled case, stating that the sale of the property described in Notice would take place at E. Door, Courthouse, on the 12th day of May, 1913, as follows, to wit: One notice at the east entrance of the Courthouse; one notice on the County Bulletin Board at Bridge & — St; one notice on the County Bulletin Board at N. End Post St. Bridge, all in Spokane County, Washington.

GEO. E. STONE,

Sheriff.

By W. A. Lothrop,

Deputy Sheriff. [46]

Notice—Sheriff's Sale of Personal Property.**SHERIFF'S OFFICE.**

State of Washington,
County of Spokane,—ss.

By virtue of an Execution issued out of the Superior Court of the State of Washington for the County of Spokane, and to me directed and delivered, for a judgment rendered in said Court on the 8th day of April, A. D. 1913, in favor of John E. Murphy, plaintiff, and against S. O. Leland and Amelia Leland, his wife, defendants, for the sum of

\$105.50, with interest at the rate of 6 per cent per annum from said 8th day of April, A. D. 1913, and the further sum of \$—— attorneys' fees and \$17.00 costs of suit, I have levied upon the following described personal property, to wit:

Certificate No. 1, for Fifty (50) Shares of the Capital Stock of the Leland Company, a Corporation.

NOTICE IS HEREBY GIVEN, that on the 12th day of May, A. D., 1913, at the hour of 10 o'clock A. M. of said day, at E. Door, Courthouse, Spokane, Wn., in said County of Spokane, I will sell all the right, title and interest of the said S. O. Leland and Amelia Leland, his wife, defendants, in and to the above-described personal property at public auction, to the highest and best bidder for cash, to satisfy said execution and all costs.

Given under my hand, this 1st day of May, 1913.

GEO. E. STONE,

Sheriff.

By W. A. Lothrop,

Deputy. [47]

*In the Superior Court of the State of Washington,
for the County of Spokane.*

No. 41,258.

JOHN E. MURPHY,

Plaintiff,

vs.

S. O. LELAND and AMELIA LELAND, his Wife,
Defendants.

Execution.

To the Sheriff of Spokane County, Greeting:

Whereas, John E. Murphy recovered judgment against S. O. Leland and Amelia Leland, his wife, in the Superior Court of said County and state, holding terms as aforesaid, on the 8th day of Apr. 1913, for the sum of \$105.50 Dollars, with interest thereon at the rate of 6% from Apr. 8/1913, per annum, until paid, — Dollars Attorney Fees, and 17.00 Dollars costs of suit, amounting in all to the sum of One Hundred Twenty-two 50/100 Dollars (\$122.50).

Therefore, in the name of the State of Washington, you are hereby commanded to levy upon, seize and take into execution the personal property of the said S. O. Leland and Amelia Leland, his wife, in your county, sufficient, subject to execution, to satisfy said judgment, interest and increased interest, cost and increased cost, and make sale thereof according to law; and if sufficient personal property cannot be found, then you are further commanded to make the amount of said judgment, interest and increased interest, cost and increased cost, out of any real property, not exempt by law, and make return of this writ within sixty days from the date hereof.

Witness the Honorable E. H. SULLIVAN, Judge of said Superior Court, and the seal of said court hereto affixed, this 1st day of May, A. D. 1913.

[Seal]

GLENN B. DERBYSHIRE,

County Clerk.

By W. E. Steinmetz,

Deputy. [48]

SHERIFF'S RETURN.

State of Washington,
County of Spokane,—ss.

I hereby certify, that I received the within execution on May 1st, 1913, and I have this day levied on the following described property, to wit: Certificate No. 1 for Fifty (50) Shares of the Capital Stock of the Leland Company, a corporation, of the State of Montana.

Dated this 1st day of May, 1913.

GEO. E. STONE,
Sheriff of said County.
By W. A. Lothrop,
Deputy.

Filed May 12, 1913, at 11:35 o'clock A. M. Glenn B. Derbyshire, Clerk. C. W. Hopkins, Deputy.
[49]

In the Superior Court.

The State of Washington,
County of Spokane,—ss.

I, Glenn B. Derbyshire, Clerk of the Superior Court, within and for said County of Spokane, State of Washington, do hereby certify that I have compared the foregoing copies of the record of the Summons, Complaint, Motion and Affidavit for Default, Order of Default, Affidavit of Service, Judgment, Sheriff's Return on Sale of Personal Property, and Execution in the case of John E. Murphy, Plaintiff, vs. S. O. Leland and Amelia Leland, Defendants, with the original records thereof now re-

maintaining in this office, and have found the same to be correct transcripts therefrom, and of the whole of such original records. And I further certify that said exemplification would be received in evidence in all the Courts of the State of Washington.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Spokane, in said County and State, this 26th day of May, 1913.

[Seal]

GLENN B. DERBYSHIRE,

Clerk of said Superior Court.

By Otto W. Blenner,

Deputy. [50]

In the Superior Court.

The State of Washington,
County of Spokane,—ss.

I, E. H. Sullivan, one of the Judges of the Superior Court, within and for the said County of Spokane, State of Washington, do hereby certify that the said Court is a Court of Record, and that Glenn B. Derbyshire is the clerk of said Superior Court; and Otto W. Blenner, whose signature is affixed to the foregoing certificate, is a duly appointed and acting deputy clerk of said Superior Court; that said certificate is attested in due form of law; that the aforesaid signature of said deputy clerk is genuine, and that the seal thereto affixed is the seal of said Superior Court.

WITNESS my hand at Spokane, in said County and State, this 26th day of May, 1913.

E. H. SULLIVAN,

Judge of said Superior Court.

In the Superior Court.

The State of Washington,
County of Spokane,—ss.

I, Glenn B. Derbyshire, Clerk of the Superior Court, within and for the County of Spokane, State of Washington, do hereby certify that the Hon. E. H. Sullivan, whose name is subscribed to the preceding certificate, is one of the Judges of the Superior Court, within and for the County of Spokane as aforesaid, duly elected, sworn and qualified, and that the signature of said Judge to said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Spokane in said County and State, this 26th day of May, A. D. 1913.

[Seal]

GLENN DERBYSHIRE.

By Otto W. Blenner,
Deputy.

[Endorsed]: P. Ex. 10. Filed and entered Feb. 1, 1916. Geo. W. Sproule, Clerk. By ———, Deputy Clerk. [51]

Defendants' Exhibit "A"—Contract Between E. C. Murphy and S. O. Leland.
CONTRACT.

THIS AGREEMENT, made and entered into at Spokane, Washington, this — day of May, 1912, by and between E. C. MURPHY of Hillyard, Washington, the party of the first part, and S. O. LELAND, of Spokane, Washington, the party of the second part,

WITNESSETH, that whereas, the said parties have heretofore made certain trades of property whereby the said party of the first part has heretofore deeded to the said party of the second part Lot One (1) and the west twenty (20) feet of Lot Two (2) in Block Thirty-nine (39) of Union Park Addition to Spokane, Washington, also the property known as the "South Avenue Hotel" in Hillyard, Washington, and received therefore Fifty (50) shares of stock in the Leland Grocery Company, and WHEREAS each of the said parties has a claim against the other growing out of said trades,

NOW THEREFORE, for the purpose of adjusting said claims and making full settlement and satisfaction thereof and of all differences existing between said parties, the said party of the first part does hereby sell to the said party of the second part a certain piano, located at No. 2404 East Sixth Avenue, for the sum of \$100.00, and agrees to transfer and deliver to the said party of the second part the said Fifty (50) shares of stock in the said Leland Grocery Company, in consideration of which the said party of the second part does hereby agree to convey, by good and sufficient quit claim deed, to the said party of the first part, the said Lot One (1) and the west twenty (20) feet of Lot Two (2) in Block Thirty-nine (39) in Union Park Addition, also the said South Avenue Hotel property in Hillyard, Washington, and further agrees, that in case it becomes necessary for the said party of the first part, his grantee or assigns, to bring suit to quiet

title to the said South Avenue Hotel property in Hillyard, or the lots on which the said hotel is now situated, that the said party of the second part will pay towards the [52] expenses of such suit the sum of \$30.00, and in further consideration of the covenants on the part of each of the said parties herein, each of said parties does hereby release the other from all claims, of every kind and nature, that each may have against the other, and does hereby acknowledge full satisfaction of all such claims.

The obligations of this contract shall extend to and be binding upon the heirs, personal representatives and assigns of both parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their respective names the day and year first above written.

E. C. MURPHY.

S. O. LELAND.

Filed and entered Feb. 1, 1916. Geo. W. Sproule,
Clerk. [53]

Thereafter, on Feb. 4, 1916, the Opinion of the Court was duly filed herein, in the words and figures following, to wit: [54]

*In the District Court of the United States, District
of Montana.*

WALTER B. MITCHELL,

vs.

THE LELAND CO., et al.

Opinion—February 4, 1916.

HEREIN, the Court finds the issues for defendants. And therefrom concludes that plaintiff is not entitled to any relief herein. Costs to defendants.

MEMO.

The shares involved were in Leland's name on the defendant corporation's books. He sold them to Murphy and delivered to the latter the share certificate properly assigned. Murphy had no transfer on the books, and resold the shares and other property to Leland.

Leland performed his part of that contract—deeded certain realty to Murphy and delivered to him a check for \$100. Thereupon Murphy delivered the share certificate to Leland. Immediately, however, Murphy demanded other money from Leland, and upon Leland's refusal to pay, Murphy wrested the share certificate from Leland's hands. Thereafter, on Leland's repeated demands for it, he assured Leland it was lost.

By subsequent assignments the share certificate is in plaintiff's hands. When Murphy delivered the share certificate to Leland he had no further interest therein. He no longer had even a vendor's lien to secure the \$100, for that was waived by parting with possession of the certificate. He committed a trespass by his resumption of possession, and could not thereby restore his lien. The lien would be waived for the further reason that (if claimed at all) it was in part based on an unwarranted demand for

other money than that due under the contract of sale. And he had been in legal effect paid the \$100 so far as lien is concerned. Murphy having no right to the share certificate, plaintiff secured none by Murphy's assignment. [55] The plaintiff is not entitled to a transfer of the shares to himself on defendant's books. The purchase of the share certificate at execution sale amounts to nothing. Corporate shares cannot be sold on execution save by lawful levy upon the corporation. It is not enough that someone presents to a corporation one of its share certificates properly assigned. He must also be entitled to a transfer. And if the corporation is advised that he is not so entitled, it is its duty to refuse a transfer.

The differences, if any, between plaintiff and Leland are not involved in this suit. All that can be and is determined is that plaintiff is not owner of and has no right to a transfer of the Leland shares by defendant upon its books, and so is not entitled to damages for defendant's refusal to transfer.

BOURQUIN, J.

Filed Feb. 4, 1916. Geo. W. Sproule, Clerk. [56]

Thereafter, on February 15, 1916, Decree was duly entered herein, in the words and figures following, to wit: [57]

*In the District Court of the United States, for the
District of Montana.*

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Corporation, and
FRANK LIND, Pres., and THEODORE
LELAND, Sec., of said Corporation,

Defendants.

Decree.

This cause came on for trial; a motion for judgment on the pleadings was interposed and overruled. By the original complaint the controversy was equitable in its nature, and, it appearing to the Court that the action in conversion set forth in the amended pleading was barred, on both the original and amended complaint, if the plaintiff was the owner of the stock in question, he would be entitled to relief. The action was thereupon tried as if it were an equitable one and on the cause of action set out in the original complaint, plaintiff agreeing thereto.

Upon due consideration of all the evidence, the Court finds that plaintiff is not entitled to recover upon the facts set out in the complaint.

IT IS ORDERED, ADJUDGED and DECREED, that the action be, and the same is hereby, dismissed,

and that the defendants have their costs taxed at forty-seven dollars and fifty cents.

Dated this 15th day of February, 1916.

GEO. M. BOURQUIN,

Judge.

Filed Feb. 15, 1916. Geo. W. Sproule, Clerk. [58]

That on the 8th day of February, 1916, Petition for Rehearing was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY et al.

Defendants.

Petition for Rehearing.

Comes now the plaintiff and petitions the Court for a rehearing of the above-entitled cause for the reasons and upon the following grounds:

1st. That the Court erred in finding the issues for the defendants.

2d. That the Court erred in finding the title to said stock was not established in the plaintiff.

3d. That the Court erred in finding that the said sale of said stock and the proceedings in the Superior Court of Spokane, Washington, was not a valid sale

of said stock, and that the plaintiff did not obtain any rights thereby.

4th. That the Court erred in finding the assignments of said stock from E. C. Murphy to A. Coolin and from A. Coolin to the plaintiff was not valid assignments and executed in good faith.

5th. That the Court erred in finding that the value of said stock was not proved to be the sum of \$5,000.

6th. That the Court erred in finding that the defendants have established any ground of defense and that they have proved the defense set forth in the answer.

7th. That the Court erred in prohibiting the plaintiff to introduce the stock books in evidence when the defendants abandoned the defense set forth in the answer. [59]

8th. That the Court erred in allowing S. O. Leland to testify to self-serving declarations over the objection of the plaintiff in connection with the proceedings in Spokane, Wash., and thereby deprived the plaintiff of an opportunity to meet the same, and for the further reason that it was only an attempt to introduce oral testimony to contradict a court record.

9th. That the Court erred in finding the plaintiff is not entitled to any relief herein.

10th. That the Court erred in not finding that the said S. O. Leland was estopped from claiming any rights to said stock certificate No. 1 for fifty shares of the capital stock of the Leland Co., for the reason

that he has transferred the said stock to E. C. Murphy, and the corporation by their officers had introduced answers to interrogatories expressly showing that he had no rights therein and also by its answer in said cause and he would be barred by the proceedings in Spokane from any rights or titles to said stock.

11th. That the Court erred in finding that the said defendant corporation issued a new certificate of stock to S. O. Leland in lieu of the old certificate held by the plaintiff or that said alleged new certificate was again transferred upon the books of the corporation to Theodore Leland, for the reason that the evidence in said cause as shown by the minutes of the meetings is contrary and also the stock books show no such transfer.

12th. That the Court erred in deciding the law of the case in that it has taken for granted that the stock of the corporation cannot be sold except by process in the home of the corporation, and that the domicile of the stock is the home of the corporation and the said errors of law will be more fully set forth in a brief hereto attached and made a part of this petition. [60]

The petition further states that he has discovered since the trial of said cause that the said S. O. Leland is not making any claim to the ownership of said certificate assigned by him to E. C. Murphy and pledged for the payment of certain sums of money set forth in the contract and being marked as an exhibit in said cause, and on information and belief this peti-

tioner states that the said S. O. Leland and the other officers of the corporation only presented the said defense for the purpose of defrauding the plaintiff out of his rights herein.

WHEREFORE, your petitioner prays that a rehearing of said cause be had and that the petitioner be permitted to present the law of said cause in order that rights of the petitioner can be presented fully and avoid necessity of an appeal in said cause.

W. B. MITCHELL,
Petitioner.

State of Washington,
County of Spokane,—ss.

Walter B. Mitchell, being first duly sworn, on oath deposes and says that he is the petitioner herein and the plaintiff in the said cause and that he has read the foregoing petition and knows the contents thereof and swears the same to be true as he verily believes except as to the matters set forth on information and belief, and as to those he believes them to be true, and that this petition is made in good faith, and the petitioner believes the same is meritorious.

WALTER B. MITCHELL.

Subscribed and sworn to before me this 5th day of Feb., 1916.

[Seal]

JOHN E. ORR,
Notary Public in and for the State of Washington,
Residing at Spokane.

Service of the foregoing petition for rehearing by copy admitted this 8th day of February, 1916.

FRED L. GIBSON,

C. B. NOLAN,

Solicitors for Defendants.

Filed Feb. 8, 1916. Geo. W. Sproule, Clerk. [61]

Thereafter, on Feb. 29, 1916, Decision of the Court Denying Petition for Rehearing was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

W. B. MITCHELL

vs.

LELAND CO.

Opinion—February 29, 1916.

Herein, the petition for rehearing is denied.

MEMO.

Nothing new is presented for consideration, and so no reason to rehear the matter.

Filed Feb. 29, 1916. Geo. W. Sproule, Clerk.
[62]

Thereafter, on Aug. 25, 1916, Petition for Appeal was duly filed herein, in the words and figures following, to wit: [63]

*In the District Court of the United States, in and
for the District of Montana of the 4th Division.*

WALTER B. MITCHELL,

Complainant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN, Pres., and THEODORE
LELAND, Secretary,

Defendants.

Petition for Appeal.

The above-named complainant, conceiving himself aggrieved by the decision and the final decree of this Court in this cause made and entered on the 15th day of February, 1916, while a petition for rehearing was under advisement by the Court and which petition for rehearing was denied on the 29th day of February, 1916, making the decree final in the above-entitled cause, for the reasons specified in the assignment of errors which is filed herein, does hereby appeal from the said decision and decree, and each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and he does hereby petition the Court for an order allowing him to prosecute such appeal that the appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decision and

decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that a bond on such appeal may be fixed.

Dated this the 24th day of August, 1916.

_____, (Signed)

WALTER B. MITCHELL, (Signed)

Solicitors for Complainant.

Filed Aug. 25, 1916. Geo. W. Sproule, Clerk.
[64]

Thereafter, on Aug. 25, 1916, an Assignment of Errors was duly filed herein, in the words and figures following, to wit: [65]

In the District Court of the United States, in and for the Fourth Division of the State of Montana.

No. 56.

WALTER B. MITCHELL,

Complainant,

vs.

THE LELAND COMPANY, a Cor., FRANK LINN, Pres., and THEODORE LELAND, Sec.

Defendants.

Assignment of Errors.

Walter B. Mitchell, the above-named complainant and appellant, hereby assigns error on the decree of the District Court of the United States for the Fourth Division of the District of the State of Mon-

tana, in the above-entitled cause, made and entered on the 15th day of February, 1916, while a petition for rehearing was being considered by the Court, and which petition for rehearing was denied on the 29th day of February, 1916, making the decree final in the above-entitled cause, dismissing the complainant's bill, in the following particulars:

I.

The Court erred in holding the issues to be with defendants.

II.

The Court erred in holding that the title to the stock in question was not established in the plaintiff.

III.

The Court erred in holding that the plaintiff obtained nothing from the assignments of E. C. Murphy and A. Coolin of said certificate and sheriff bill of sale thereof.

IV.

The Court erred in holding that defendants have established any defense to the plaintiff's complaint whatsoever.

V.

The Court erred in prohibiting the complainant from introducing in evidence the stock books of the corporation, for the purpose of showing that no transfer of any certificate of stock was ever issued to Theodore Leland. [66]

VI.

The Court erred in permitting the witness S. O. Leland over the objection of the complainant to testify as follows:

“That he had completed his contract with Murphy; deeded certain realty to Murphy and delivered Murphy a check for \$100; thereupon Murphy delivered the share certificate in question herein to him; immediately, however, Murphy demanded other money from me and upon my refusing to pay, Murphy wrested the share certificate from my hands, and thereafter on my repeated demand for it he assured me that it was lost,”—for the reason that even if the above evidence was true, it was inadmissible in this cause, as it was for the purpose of impeaching a Judgment of the Superior Court of Spokane County and State of Washington, which was adjudicated against the said S. O. Leland, in said court, and it was wholly incompetent for the witness to attempt to contradict the said judgment, and this Court was wholly without jurisdiction so to do, and for the further reason that it was not one of the issues as raised by the pleadings and further was a total surprise to the plaintiff, and so claim on the trial of said cause, and thereby prevented the complainant of meeting any such testimony.

VII.

The Court erred in holding that the purchase of the certificate in question herein at sheriff sale in Spokane, Wash., amounted to nothing.

VIII.

The Court erred in holding that where a certificate of stock in a foreign corporation was owned by a resident of the State of Washington, and that owner had duly assigned the said certificate to another resident of State of Washington for a valu-

able consideration, and subsequently made a contract with the other resident in which the former owner was to pay a certain sum of money, etc., and upon doing so the said certificate was to be transferred back to him, and the said former owner having failed to so pay as agreed, the holder of said certificate brought [67] a suit against the said former owner (who was still residing in the State of Washington) to enforce the contract for the payment of the money and obtained personal service within the State of Washington upon said former owner, and the cause proceeded to judgment on said contract in favor of the holder of said certificate, whereupon the Court directed execution to be issued and caused the sheriff to seize the said certificate under the statute of the State of Washington, providing that any personal property of the judgment debtor within the jurisdiction of the Court may be seized and sold to satisfy the judgment, and the sheriff in pursuance of such execution did actually seize the said certificate in question and take the same into his possession and proceeded to sell according to the laws of the State of Wash., and the sheriff having sold the said certificate and all the rights, titles and interests of the judgment debtor in and to said certificate to the highest bidder at such sale and delivered to said purchaser a bill of sale thereof and also the certificate itself; and the Court erred in holding that under this state of facts the purchaser at such sale derived no title or claim in or to said certificate and no right to have the same

transferred to said purchaser on the books of the corporation.

IX.

The Court erred in holding that the cause of action for conversion was barred on the original complaint herein.

X.

The Court erred in holding that corporate shares cannot be sold on execution save upon lawful levy upon the corporation.

XI.

The Court erred in holding the complainant is entitled to no relief herein and in not holding that complainant was entitled to the full relief prayed for herein. [68]

XII.

The Court erred in not giving full faith and credit to the proceedings in Spokane, Wash., being the records of a court of record of the State of Washington, in violation of the Constitution of the United States, article 4, sec. I.

WHEREFORE, complainant prays that the decree heretofore entered against him may be reversed and the cause remanded for such further proceedings as are required by the principles of equity and the record in this case.

WALTER B. MITCHELL,
Solicitor for Complainant.

Filed Ang. 25, 1916. Geo. W. Sproule, Clerk.
[69]

Thereafter, on Aug. 25, 1916, an abstract of the testimony was duly lodged with the clerk by plaintiff herein, and thereafter filed on Jan. 2, 1917, in the words and figures following, to wit: [70]

*In the District Court of the United States, for the
4th Division of the State of Montana.*

IN EQUITY.

WALTER B. MITCHELL,

Complainant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN, President, and THEODORE
LELAND, Secretary,

Defendants.

Testimony.

The following is an abstract of the testimony of the witness sworn upon the trial of the above-entitled cause, and of such parts of said testimony as the complainant deems material for the review of the above-entitled cause by the Circuit Court of Appeals, and hereby lodges the same with the clerk of the District Court of the United States for the 4th Division, of the State of Montana, for said purpose, and requests the defendants to file any amendments thereto which they deem proper within the time allowed by law.

Dated this the 24th day of August, 1916.

WALTER B. MITCHELL,
Solicitors for Complainant. [71]

ABSTRACT OF TESTIMONY.

Upon the trial of said cause the defendants interposed a motion for judgment on the pleadings based on the amended bill of complaint, their answer thereto and the reply of the complainant's, which motion was overruled, and it appearing that the said cause of action being an equitable action it was agreed to try said cause on the original bill of complaint and in pursuance to said agreement it was so tried.

Testimony of Walter B. Mitchell, for Plaintiff.

WALTER B. MITCHELL, a witness called on behalf of the plaintiff, after being first duly sworn testified in substance as follows:

Direct Examination.

That the defendants had admitted by its answer to the original complaint everything alleged except the ownership of the stock and value thereof. And then identified the assignment of said certificate of stock from E. C. Murphy to A. Coolin and testified he was acquainted with the signature and that it was E. C. Murphy signature, and offered said assignment in evidence and the same was received as exhibit (—), and further testified that on or about the — day of May, 1912, the said S. O. Leland entered into a contract with E. C. Murphy for the transfer of said certificate of stock in question in the suit; and that suit was brought on said contract by John E. Murphy, the assignee of E. C. Murphy, to enforce the same in the Superior Court of Spokane County

(Testimony of Walter B. Mitchell.)

and State of Washington, and that said court was a court of record in said State of Washington, and then identified the exemplified copy of the proceedings of said court of the files and records in that court, and introduced them in evidence, and the same was received in evidence as exhibit (—); and further testified and identified the assignment and contract between A. Coolin and witness, saying he was acquainted with the signature of A. Coolin and that the signature on the assignment was that of A. Coolin; the same was offered in evidence as exhibit (—) and received by the Court; [72] and further testified after qualifying as an accountant that he had examined the books of the corporation, which was presented to him by Frank Linn, president of said corporation, in compliance of the order of the Court, and found that there had been no trial balances taken, no profit or loss accounts taken, or no expense account kept since the corporation was organized, and that there were no regular posting of the said books, and that all the corporation had done was to keep track of the sales and had from time to time taken an inventory of the assets; and that it was impossible to determine from said books alone without the inventories what the state of the business was in at this time, and that the only way that the value of said stock could be determined was to determine it from the assets and liabilities of the corporation;

He further testified that upon examination of the

(Testimony of Walter B. Mitchell.)

inventories as prepared by Frank Linn, Pres., he found as follows:

“Inventory taken Nov. 10, 1913, Mer-	
chandise	\$14175.32
Accounts due the corporation.....	9472.37
Cash in Bank	2666.16
<hr/>	
Total Assets	26313.85
Debts	3008.54
<hr/>	
Net Assets,	23305.31”

—and that since the stock in question represents one-fourth of the capital stock of the corporation the value of it would be \$5,828.32.

He further testified that another inventory was taken on January 1st, 1915, as follows:

“Inventory of Merchandise.....	
Accounts due corp.	\$15338.08
Cash in Bank	4816.49
<hr/>	
Total Assets	3880.00
Debts	24034.57
<hr/>	
Net Assets,	8796.20
<hr/>	
Net Assets,	\$15238.37”

—the above debts was not checked so as to verify the amount and it was taken from Frank Linn’s Schedules; that the sale reported by the corporation from 1st of year 1913, to January, 1914, amounted to the sum of \$43,168.16, and for year 1914, \$34,485.16.

He also identified the certificate of stock in question and introduced the same in evidence and it was

(Testimony of Walter B. Mitchell.)

received, he [73] saying that this certificate was delivered to him at the sale of the same conducted by the sheriff, as he had bid in the stock in the name of A. Coolin at said sale.

PLAINTIFF RESTED.

Testimony of Frank Linn, for Defendants.

FRANK LINN, a witness called on behalf of the defendants, after being first duly sworn, testified in substance as follows:

Direct Examination.

That he was the president of the corporation and had brought the books of the corporation with him as per the order of the Court, and identified them and also the inventories, and the figures of the inventories were the same as Walter B. Mitchell had testified to, except that he claimed the indebtedness of the corporation on November 10, 1913, amounted to the sum of \$11,076.38; and that the stock in question in this suit was worth the sum of \$2,500.00.

Cross-examination.

He testified he had taken the inventories and that the amounts set forth in said inventories as the price of said merchandise was the actual value of the goods at the time of taking said inventory; and in answer to an inquiry as to how he arrived at the amount of indebtedness of \$11,076.38, he testified he did not know, but when taken over each page of the book in which he kept the account of the debts due he verified the statements of Mr. Mitchell of the

(Testimony of Frank Linn.)

indebtedness only being \$3,008.54. The plaintiff offered the books of accounts in evidence then and the defendants objected on the grounds of incompetency and irrelevancy, and the Court overruled the objection and the same was admitted and marked defendants' exhibits (——).

He further testified that the minute-books of the corporation only showed the corporation held one meeting since the stock was issued to S. O. Leland in Sept., 1911, and that was in Dec. 1912, and another on May 21st, 1913, and that at none of these meetings was the question taken up of any lost certificate, and that the corporation received notice of the certificate being held by A. Coolin on the 17th day of May, 1913, and before that even. Plaintiff read into the record then the by-laws of the corporation [74] pertaining to the issuing of certificates of stock in case of one being lost and asked that the clerk include the same in the exhibits.

Plaintiff then offered the stock books of the corporation for the purpose of showing that there had never been any transfer made to Theodore Leland on the books of the corporation, and asked that the same be admitted in evidence; defendants objected to the introduction and the Court sustained the objection.

Testimony of S. O. Leland, for Defendants.

S. O. LELAND, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

That he was the one referred to in said certificate

(Testimony of S. O. Leland.)

in question herein, and that he had transferred and delivered the said certificate to E. C. Murphy for a valuable consideration, to wit: real estate of equal value on or about the 6th of March, 1912, and that some time in — May, 1912, he entered into a contract with E. C. Murphy for the return of said certificate upon S. O. Leland making certain transfers of real property and the payment of a certain sum of money to E. C. Murphy more specifically set forth in a contract, a copy of which was introduced in evidence by defendant as exhibit (——) and will also be found in the records of the Superior Court of Spokane, Wash., or plaintiff exhibit (——);

The witness was then asked to explain what occurred between him and E. C. Murphy in reference to the return of the certificate and the performance of the above-mentioned contract.

Plaintiff objected to any testimony on this subject for the reason that it was an attempt to impeach the judgment of the Superior Court of Spokane County, State of Washington, a court of record of that state, and not one of the issues raised by the pleadings, and for the further reason that the witness was personally served with process in said proceedings in Spokane, Washington, had his day in court and made no effort to appeal from said decision, and the time for appeal has since lapsed, and that the witness would now be estopped to introduce testimony to impeach said judgment; and for the further reason that the matter was fully adjudicated, and this testimony was immaterial [75] and

(Testimony of S. O. Leland.)

incompetent in this proceedings; and for the further reason that it was a total surprise to the plaintiff not having been plead in any way and would prohibit the plaintiff from rebutting the same; the Court overruled the objection and witness testified as follows: (In substance.) "That he had completed his contract with Murphy, deeded certain realty to Murphy and delivered Murphy a check for \$100.00; thereupon Murphy delivered the share certificate in question to him without any written assignment; immediately, however, Murphy demanded other money from me and upon my refusing to pay, Murphy wrested the share certificate from my hands, and thereafter on my repeated demand for it he assured me that it was lost."

Cross-examination.

Witness further testified he was personally served with process in the city of Spokane, Wash., and that he was then a resident of Spokane, Wash., and allowed the said suit to go by default and made no attempt to fight it at all; and before judgment was taken Walter B. Mitchell, plaintiff herein, tendered the certificate in question to him and demanded the money called for in said contract and he refused to pay it then; and that later, about the middle of May, he moved to California and has resided there since.

**Testimony of Walter B. Mitchell, for Plaintiff
(Recalled).**

WALTER B. MITCHELL, was recalled on behalf of the plaintiff, and testified that the date of

(Testimony of Walter B. Mitchell.)

the tender of said certificate to S. O. Leland and demand for the payment was prior to taking default in said proceedings, which according to the record of the cause was on the 8th day of April, 1913, and that at that time S. O. Leland made no claim of ever offering Murphy a check, and he refusing it or mentioning anything that would create a suspicion of anything of that nature.

Received for the court Aug. 25, 1916. Geo. W. Sproule, Clerk.

Filed Jan. 2, 1917. Geo. W. Sproule, Clerk.
[76]

Thereafter, on Aug. 25, 1916, a notice for settlement of the record was duly filed herein, in the words and figures following, to wit: [77]

*In the District Court of the United States, for the
4th Division of the State of Montana.*

No. 56—IN EQUITY.

WALTER B. MITCHELL,

Complainant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN, Pres., and THEODORE
LELAND, Sec.,

Defendants.

Notice of Settlement of Record.

To the Above-named Defendants and to Your Attorneys, C. B. Nolan and Fred L. Gibson.

Please take notice that the complainant will present the within abstract to the court at Helena, Montana, at 10 o'clock of the day of the 15th day of September, 1916, for approval unless the above date shall be agreed on by the parties for some other day more convenient for counsel.

This notice is given in compliance to rule 75, of the Equity Rules of this court.

Dated this the 24th day of August, 1916.

WALTER B. MITCHELL,
Solicitor for Complainant.

Filed Aug. 25, 1916. Geo. W. Sproule, Clerk.
[78]

Thereafter, on Aug. 26, 1916, an order allowing appeal and fixing bond was duly made and entered herein, in the words and figures following, to wit:
[79]

In the District Court of the United States, in and for the District of Montana for the 4th Division.

No. 56.

WALTER B. MITCHELL,

Complainant,

vs.

THE LELAND COMPANY, a Cor., et al.,
Defendants.

Order Allowing Appeal and Fixing Bond.

It is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from the decision and decree heretofore filed and entered herein be and the same is hereby allowed, in pursuance of the foregoing petition, and a certified transcript of the record, proceedings and papers, and all proceedings upon which such decree was made, be transmitted to the said Circuit Court of Appeals.

It is further ordered that the complainant give bond on this appeal in the sum of \$300 dollars.

Done in open court this 26th day of August, 1916.

BOURQUIN,

Judge.

Filed Aug. 26, 1916. Geo. W. Sproule, Clerk.
[80]

Thereafter, on Aug. 26, 1916, a Citation was duly issued herein, which original Citation is hereto annexed and is in the words and figures following, to wit: [81]

In the District Court of the United States, in and for the 4th Division of the State of Montana.

IN EQUITY—No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

Citation.

The United States of America to The Leland Company, a Corporation, Frank Linn, President, and Theodore Leland, Secretary, of said Corporation, Defendants, GREETING:

Whereas, Walter B. Mitchell, the complainant in the above-entitled case, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree lately rendered in the District Court of the United States for the 4th Division of the State of Montana, made in favor of you on the 15th day of February, 1916, while a petition for rehearing was under advisement by the said trial court, and which petition was denied on the 29th day of February, 1916, making said decree final, and has furnished the security required by law:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to such appeal, and to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Butte, State of Montana, in the Ninth Circuit, this 26 day Aug.,

in the year of our Lord one thousand nine hundred and sixteen.

BOURQUIN,

District Judge Presiding Therein.

[Seal]

Attest: GEO. W. SPROULE,

Clerk.

By Harry H. Walker,

Deputy. [82]

Service of the within citation is hereby acknowledged this the — day of —, 1916.

FRED L. GIBSON,

WALSH, NOLAN & SCALLON,

Attorneys for Defendants, The Leland Company, a
Cor., and Frank Linn, President, and Theodore
Leland, Secretary. [83]

[Endorsed]: No. 56. In the District Court of the
United States for the 4th Division of the State of
Montana. Walter B. Mitchell, Complainant, vs. The
Leland Company, a Corporation, et al., Defendants.
Citation. Filed Sept. 21, 1916. Geo. W. Sproule,
Clerk. [84]

That on August 25, 1916, a praecipe for transcript on appeal was filed by plaintiff herein, in the words and figures following, to wit: [85]

In the District Court of the United States, in and for the 4th Division of the State of Montana.

No. 56.

WALTER B. MITCHELL,

Complainant,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

Praecipe for Transcript on Appeal.

To Geo. W. Sproule, Clerk of the District Court of the United States, in and for the 4th Division of the State of Montana.

Whereas, the above-named plaintiff, Walter B. Mitchell, on the — day of August, 1916, petitioned the above-entitled court for an order allowing an appeal of said cause to the Circuit Court of Appeal for the Ninth Circuit, and said order allowing said appeal was made and entered on the — day of August, 1916, and Bond fixed by the Court, and a further order made for a transcript of the papers, etc., in said cause to be certified to the said Circuit:

Now, therefore, in accordance with rule 75 and 76 of the rules of practice of the above-entitled courts, you are hereby requested to include in said transcript the following parts of the record, and attached abstract of the testimony, the same being what the

complainant and appellant deems material to the review of the decision of this Court in the *appellant* court, to wit:

1. The original bill of complaint.
2. The defendants' answer to original bill of complaint.
3. The written ruling of the Court with Memo. filed on Feb. 4, 1916.
4. Decree of the Court signed and filed Feb. 15, 1916.
5. Decision of the Court denying the petition for rehearing filed on the 29th day of Feb., 1916, including proof of date of filing of petition for rehearing.
6. All exhibits introduced at the trial of said cause.
7. The abstract of the parts of the testimony hereto attached.

You are hereby requested to prepare the above transcript according to the rules and practice of the above-entitled court.

Dated this 24th day of Aug., 1916.

WALTER B. MITCHELL,

Attorney for complainant.

Filed Aug. 25, 1916. Geo. W. Sproule, Clerk. [86]

Thereafter, on Sept. 2, 1916, a praecipe for additional portions of the record to be incorporated in the transcript on appeal was filed by defendants herein, in the words and figures following, to wit:

*In the District Court of the United States, in and
for the District of Montana.*

WALTER B. MITCHELL,

Plaintiff and Appellant,

vs.

THE LELAND COMPANY, a Corporation, et al.,
Defendants and Appellees.

Praecipe for Additional Portions of Record.

The appellees above named and their solicitors desire to add to the record on appeal, as provided for in the praecipe on file in said action, additional portions of the record as follows:

1. Stipulation allowing an amendment to bill of complaint bearing date September 23, 1915, and filed October 13, 1915.
2. Amended bill of complaint filed pursuant to said stipulation on October 13, 1915.
3. Answer to said amended bill of complaint filed October 21, 1915.
4. Reply to said answer filed October 29, 1915; and
5. Motion for judgment on the pleadings and ruling thereon.

F. L. GIBSON,

C. B. NOLAN,

Solicitors for Defendants and Appellees.

Filed Sept. 2, 1916. Geo. W. Sproule, Clerk. [87]

Thereafter, on Sept. 15, 1916, bond on appeal was duly filed herein, in the words and figures following, to wit: [88]

In the District Court of the United States, in and for the 4th Division of the State of Montana.

IN EQUITY—NO. 56.

WALTER B. MITCHELL,

Complainant,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Walter B. Mitchell, as principal, and The Aetna Accident & Liability Company, of Hartford, Connecticut, as sureties, are held and firmly bound unto the Leland Company, a Corporation, and Frank Linn, President, and Theodore Leland, Secretary, in the full and just sum of Three Hundred (\$300.00) Dollars, to be paid unto the above-named obligees, their attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with out seals, and dated this 12th day of September, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a District Court of the United States for the 4th Division of the State of Montana,

in an action in said court between Walter B. Mitchell, complainant, and The Leland Company, a corporation, and Frank Linn, President, and Theodore Leland, Secretary, a decree was rendered against the said Walter B. Mitchell, complainant, and he, said Walter B. Mitchell, complainant, having obtained an appeal and filed a copy thereof in the clerk's office of the said Court, to reverse the decree in the aforesaid suit, and a citation directed to the said Leland Company, a corporation, and Frank Linn, President, and Theodore Leland, Secretary, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, of said Circuit, on the 25th day of September next. [89]

NOW, the condition of the above obligation is such that if the said Walter B. Mitchell, complainant, shall prosecute his appeal to an end, and answer all damages and costs, if he fails to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

WALTER B. MITCHELL,
Principal.

THE AETNA ACCIDENT & LIABILITY
COMPANY.

[Corporation Seal] By J. F. PETERS,
Its Resident Vice-President.

By F. W. MADDUX,
Its Resident Assistant Secretary.

This Bond approved as to form and amount and sufficiency of surety.

Dated this the 15th day of Sept., 1916.

BOURQUIN,

District Judge and One of the Judges of the United
States Circuit Court Presiding Therein.

Filed Sept. 15, 1916. Geo. W. Sproule, Clerk. [90]

Thereafter, on Sept. 15, 1916, an order extending time to file record on appeal was duly made and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and
for the District of Montana.*

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

**Order Extending Time from September 25, 1916, to
October 25, 1916, for Return of Citation.**

Upon consideration of the motion of the plaintiff and good cause appearing,—

IT IS ORDERED that the time for the return of the citation in the above-entitled cause which was heretofore made returnable on the 25th of September, 1916, be and the same is hereby extended thirty days from the 25th day of Sept., 1916, to the 25th day of October, 1916.

Done in open court this the 15 day of Sept., 1916.

BOURQUIN,

Judge.

Entered Sept. 15, 1916. Geo. W. Sproule, Clerk.

[91]

Thereafter, on Oct. 16, 1916, an order extending time to file record on appeal was duly made and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and
for the District of Montana.*

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

**Order Extending Time from October 25, 1916, to
November 25, 1916, for Return of Citation.**

Upon consideration of the motion of the plaintiff and good cause appearing,—

IT IS ORDERED that the time for the return of the citation in the above-entitled cause which was heretofore made returnable on the 25th of September, 1916, and by order of the Court extended to and including the 25th day of October, 1916, be and the same is hereby extended thirty days from the 25th day of October, 1916, to and including the 25th day of November, 1916.

Done in open court this 16 day of October, 1916.

BOURQUIN,

Judge.

Entered Oct. 16, 1916. Geo. W. Sproule, Clerk.

[92]

Thereafter, on Nov. 16, 1916, an order extending time to file record on appeal was duly made and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and
for the District of Montana.*

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

**Order Extending Time from November 25, 1916, to
December 25, 1916, for Return of Citation.**

Upon consideration of the motion of the plaintiff and good cause appearing,—

IT IS HEREBY ORDERED that the time for the return of the citation in the above-entitled cause which was heretofore made returnable on the 25th day of September, 1916, and by order of the Court extended to and including the 25th day of October, 1916, and again by order of the Court extended to and including the 25th day of November, 1916, be and the same is hereby extended thirty days from the 25th day of November, 1916, to and including the 25th day of December, 1916.

Done in open court this 16 day of November, 1916.

BOURQUIN,

Judge.

Entered Nov. 16, 1916. Geo. W. Sproule, Clerk.

Thereafter, on Dec. 18, 1916, an order extending time to file record on appeal was duly made and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and
for the District of Montana.*

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

**Order Extending Time to January 5, 1917, for
Return of Record.**

In the absence of the record of the case, the Court is not clear in recollection. However, so far as the attached affidavit goes, no cause is disclosed for further time.

If respondent has not complied with the rules, appellant need not delay but can and long since should have proceeded. The time is extended to Jan. 5, 1917, if thus permitted.

Dec. 18, 1916.

BOURQUIN,

Judge.

Entered Dec. 18, 1916. Geo. W. Sproule, Clerk.

Thereafter, on Jan. 2, 1917, an order extending time to file record on appeal was duly made and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and
for the District of Montana.*

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,
Defendants.

**Order Extending Time from January 5, 1917, to
January 25, 1917, for Return of Citation.**

Upon consideration of the motion of the plaintiff and good cause appearing,—

IT IS ORDERED that the time for the return of the citation in the above-entitled cause which was heretofore made returnable on the 25th day of August, 1916, and has been extended by order of Court from time to time to the 5th day of January, 1917, be and the same is hereby extended twenty days from the 5th day of January, 1917, to and including the 25th day of January, 1917.

Done in open court this the 2d day of January, 1917.

BOURQUIN,

Judge.

Entered Jan. 2, 1917. Geo. W. Sproule, Clerk.

Thereafter, on Jan. 2d, 1917, motion for order approving the record on appeal herein, and an order approving the record, was duly filed and entered herein, in the words and figures following, to wit:

*In the District Court of the United States, in and
for the District of Montana.*

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

Motion for Order Settling Statement.

Comes now the plaintiff and asks the Court for an order settling the record on appeal in the above-entitled cause as made and filed on the 25th day of August, 1916, together with the additional praecipe filed by the defendants, for the reason that the defendants have not served or filed any objections to the proposed statement of the plaintiff so filed or have they requested any amendments and the time for filing the same has long since been up.

This motion is based on the files and record in said cause and affidavit of Walter B. Mitchell following.

WALTER B. MITCHELL,

Attorney for Plaintiff.

State of Washington,

County of Spokane,—ss.

Walter B. Mitchell, being first duly sworn, on oath deposes and says that he is the plaintiff and that the defendant has not served or filed any amendments in

the above-entitled cause and the time for doing so has long since lapsed.

WALTER B. MITCHELL.

Subscribed and sworn to before me this the 20th day of December, 1916.

[Seal] JAMES M. SIMPSON,
Notary Public for the State of Washington, Residing
at Spokane.

Record, as requested by the parties, approved
1-2-17.

BOURQUIN,
Judge.

Filed Jan. 2, 1917. Geo. W. Sproule, Clerk. [96]

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 96 pages, numbered consecutively from 1 to 96, inclusive, is a true and correct transcript of the pleadings, orders, decree, opinions of the Court, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipes of the appellant and the appellees for said record on appeal, including the exhibits (except certain books withdrawn from the files of said court by order of the Court dated February 15, 1916), and

said praecipis, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record on appeal amount to the sum of Twenty-six 75/100 Dollars (\$26.75), and have been paid by the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 31st day of January, A. D. 1917.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk. [97]

[Endorsed]: No. 2932. United States Circuit Court of Appeals for the Ninth Circuit. Walter B. Mitchell, Appellant, v. The Leland Company, a Corporation, Frank Linn and Theodore Leland, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed February 5, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

*In the District Court of the United States, in and
for the 4th Division of the State of Montana.*

IN EQUITY—No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

**Order Extending Time from September 25, 1916, to
October 25, 1916, for Return of Citation (Original).**

Upon consideration of the motion of the plaintiff
and good cause appearing,—

IT IS ORDERED that the time for return of the
citation in the above-entitled cause which was here-
tofore made returnable on the 25th day of Septem-
ber, 1916, be and the same is hereby extended thirty
days from the 25th day of Sept., 1916, to the 25th
day of October, 1916.

Done in open court this the 15 day of Sept., 1916.

BOURQUIN,

Judge.

[Endorsed]: Walter B. Mitchell vs. The Leland
Company, a Corporation, et al. Order Extending
Time to File Record on Appeal.

*In the District Court of the United States, in and
for the 4th Division of the State of Montana.*

IN EQUITY—No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

**Order Extending Time from October 25, 1916, to
November 25, 1916, for Return of Citation
(Original).**

Upon consideration of the motion of the plaintiff
and good cause appearing,—

IT IS ORDERED that the time for the return of
the citation in the above-entitled cause which was
heretofore made returnable on the 25th of September,
1916, and by order of this Court extended to and
including the 25th day of October, 1916, be and the
same is hereby extended thirty days from the 25th
day of October, 1916, to and including the 25th day
of November, 1916.

Done in open court this the 16 day of October, 1916.

BOURQUIN,

Judge.

[Endorsed]: No. ——. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Rule 16 Enlarging Time to November 25,
1916, to File Record Thereof and to Docket Case.
Filed Oct. 20, 1916. F. D. Monckton, Clerk.

*In the District Court of the United States, in and
for the 4th Division of the State of Montana.*

No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

**Order Extending Time from November 25, 1916, to
December 25, 1916, for Return of Citation
(Original).**

Upon consideration of the motion of the plaintiff
and good cause appearing,—

IT IS HEREBY ordered that the time for the
return of the citation in the above-entitled cause
which was heretofore made returnable on the 25th
day of September, 1916, and by order of the Court
extended to and including the 25th day of October,
1916, and again by order of the Court extended to
and including the 25th day of November, 1916, be and
the same is hereby extended thirty days from the
25th day of November, 1916, to and including the
25th day of December, 1916.

Done in open court this 16 day of November, 1916.

BOURQUIN,

Judge.

[Endorsed]: No. ——. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Rule 16 Enlarging Time to Dec. 25th, 1916, to

File Record Thereof and to Docket Case. Filed Nov. 20, 1916. F. D. Monckton, Clerk.

In the District Court of the United States, in and for the 4th Division of the State of Montana.

No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

Order Extending Time from December 25, 1916, to January 25, 1917, for Return of Citation (Original).

Upon consideration of the motion of the plaintiff and good cause appearing,—

IT IS ORDERED that the time for the return of the citation in the above-entitled cause which was heretofore made returnable on the 25th day of September, 1916, and by order of Court from time to time extended to the 25th day of December, 1916, be and the same is hereby extended thirty days from the 25th day of December, 1916, to and including the 25th day of January, 1917.

Done in open court this the —— day of December, 1916.

Judge.

In the absence of the record of the case, the Court is not clear in recollection. However, so far as the attached affidavit goes, no cause is disclosed for

further time. If respondent has not complied with the rules, appellant need not delay but can and long since should have proceeded.

The time is extended to January 5, 1917, if thus permitted.

Dec. 18, 1916.

BOURQUIN,
Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to January 5, 1917, to File Record Thereof and to Docket Case. Filed Dec. 23, 1916. F. D. Monekton, Clerk.

In the District Court of the United States, in and for the 4th Division of the State of Montana.

No. 56.

WALTER B. MITCHELL,

Plaintiff,

vs.

THE LELAND COMPANY, a Cor., et al.,

Defendants.

Order Extending Time from January 5, 1917, to January 25, 1917, for Return of Citation (Original).

Upon consideration of the motion of the plaintiff and good cause appearing,—

IT IS ORDERED that the time for the return of the citation in the above-entitled cause which was heretofore made returnable on the 25th of August, 1916, and has been extended by order of Court from

time to time to the 5th day of January, 1917, be and the same is hereby extended twenty days from the 5th day of January, 1917, to and including the 25th day of January, 1917.

Done in open court this the 2 day of January, 1917.

BOURQUIN,

Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to January 25th, 1917, to File Record Thereof and to Docket Case. Filed Jan. 8, 1917. F. D. Monckton, Clerk.

*In the Circuit Court of Appeals of the United States,
in and for the Ninth Circuit.*

EQUITY.

WALTER B. MITCHELL,

Plaintiff and Appellant,

vs.

THE LELAND CO. et al.,

Defendant and Appellee.

Motion for Extension of Time.

Comes now the plaintiff and moves the Court for an order extending the time for the filing of the citation in the above-entitled cause which was heretofore made returnable on the 25th day of January, 1917, for the reason and upon the grounds that the clerk of the District Court at Helena, Montana, is not able to complete the record and have the same forwarded to this court by the 25th of January, 1917.

This motion is based upon the files and records in the above-entitled cause and the affidavit hereto attached.

WALTER B. MITCHELL,
Plaintiff and Appellant.

State of Washington,
County of Spokane,—ss.

Walter B. Mitchell, being first duly sworn, on oath deposes and says that he is the plaintiff and appellant herein and that he has forwarded to the clerk of the District Court the money asked by the clerk for the record in the above-entitled cause on appeal, and that he is informed that the clerk has received the same and the said record was duly approved by the District Court on the 2d of January, 1917, and the affiant has further prepared most of the copies of the record for the clerk and forwarded them to the said clerk in order to hurry the work of preparing of the record, but that notwithstanding this the clerk of the District Court informed the affiant on the 24th day of January, 1917, that owing to sickness of the said clerk that the deputy could not be able to get the record finished and forwarded by the 25th and asked to have fifteen days' further time in order to complete the record and forward it to San Francisco, and therefore it is necessary to obtain this extension of time so that the time will not lapse in which to file the citation; affiant on account of the shortness of the time wired for a temporary extension till the motion could arrive and the formal order entered and under rule 16 it provides that the Court which signed the citation could grant the extension

or any Judge of this court, and since the time was too short to make formal application to District Court, affiant applied direct to this Court and prays that said order be granted, as this delay is unavoidable under the above state of facts.

WALTER B. MITCHELL.

Subscribed and sworn to before me this the 24th day of January, 1917.

[Seal]

EUGENE A. BARNES,

Notary Public for the State of Washington, Residing at Spokane.

*In the Circuit Court of Appeals of the United States,
in and for the Ninth Circuit.*

WALTER B. MITCHELL,

Plaintiff and Appellant,

vs.

THE LELAND COMPANY et al.,

Defendants and Appellee.

**Order Extending Time from January 25, 1917, to
February 9, 1917, for Return of Citation
(Original).**

Upon consideration of the motion of the plaintiff and good cause appearing,—

IT IS HEREBY ORDERED that the time for the return of the citation in the above-entitled cause which was heretofore made returnable on the 25th day of January, 1917, be and the same is hereby extended for a period of fifteen days to and including the 9th day of February, 1917.

Done in open court this the 25th day of January,
1917.

Judge.

Helena, Mont., Jan. 2, 1917.

Dear Sir:

In case No. 56, time extended until Jan. 25, 1917,
to get up record. Record as presented by parties
approved.

Yours truly,

GEO. W. SPROULE,

Clerk of Court.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

WALTER B. MITCHELL,

Plaintiff in Error,

vs.

THE LELAND COMPANY, a Corporation, et al.,
Defendants in Error.

**Order Extending Time to February 9, 1917, to File
Record and Docket Cause.**

Upon telegraphic application of the plaintiff in
error, and good cause therefor appearing, it is hereby
ordered that the time to file record and docket above-
entitled cause in this court be, and hereby is ex-
tended to and including February 9, 1917.

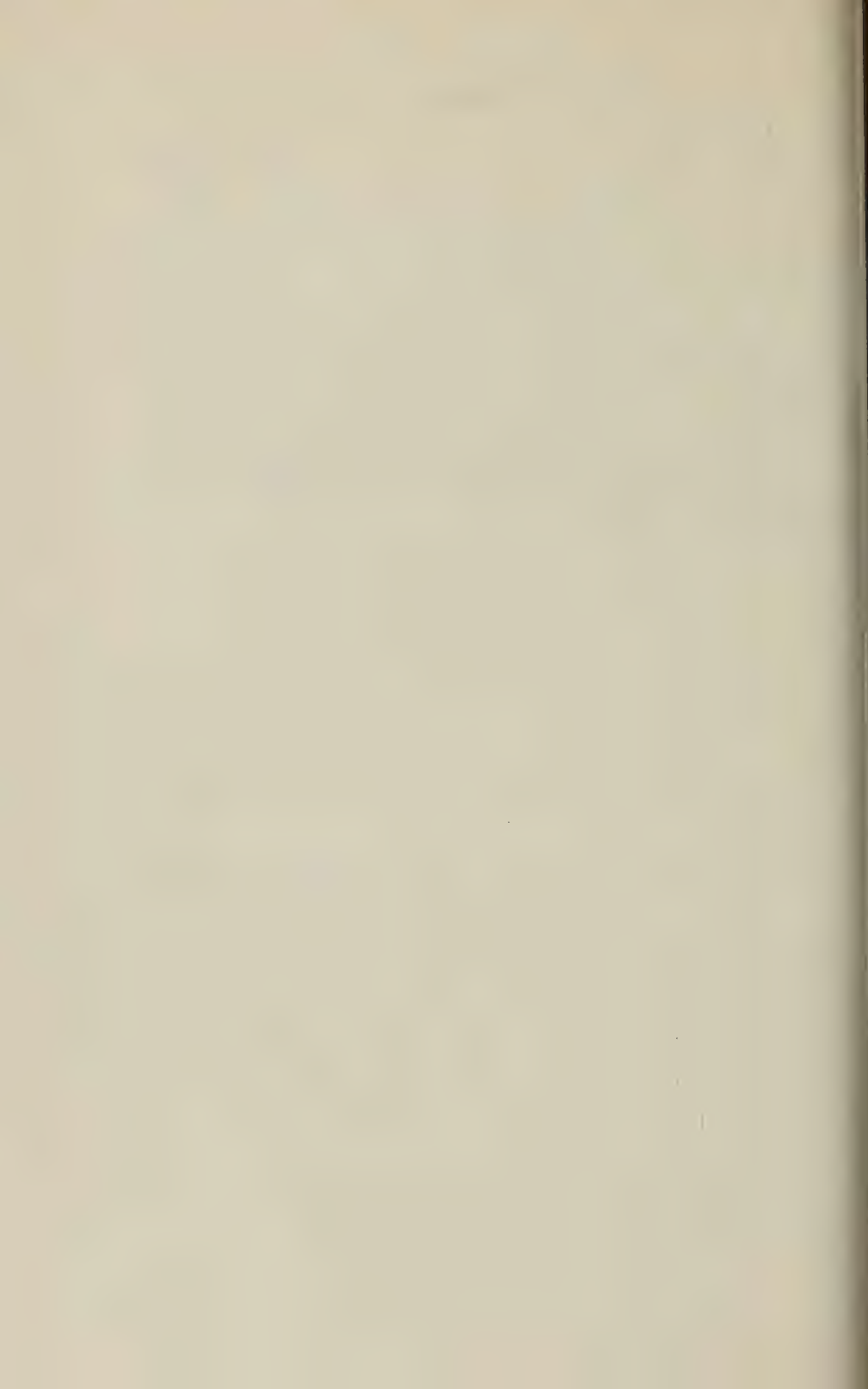
WM. W. MORROW,

United States Circuit Judge, and Judge of the
United States Circuit Court of Appeals for the
Ninth Circuit.

San Francisco, Cal., January 24, 1917.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Inclg. Feb. 9, 1917, to File Record Thereof and to Docket Case. Filed Jan. 24, 1917. F. D. Monckton, Clerk.

No. 2932. United States Circuit Court of Appeals for the Ninth Circuit. Mitchell vs. Leland Company et al. Six Orders Under Rule 16 Enlarging Time to February 9, 1917, to File Record Thereof and to Docket Case. Refiled Feb. 5, 1917. F. D. Monckton, Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

WALTER B. MITCHELL,

Appellant,

VS.

THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND,
Appellees.

Brief of Plaintiff in Error

*Upon Appeal from the United States District Court
for the District of Montana.*

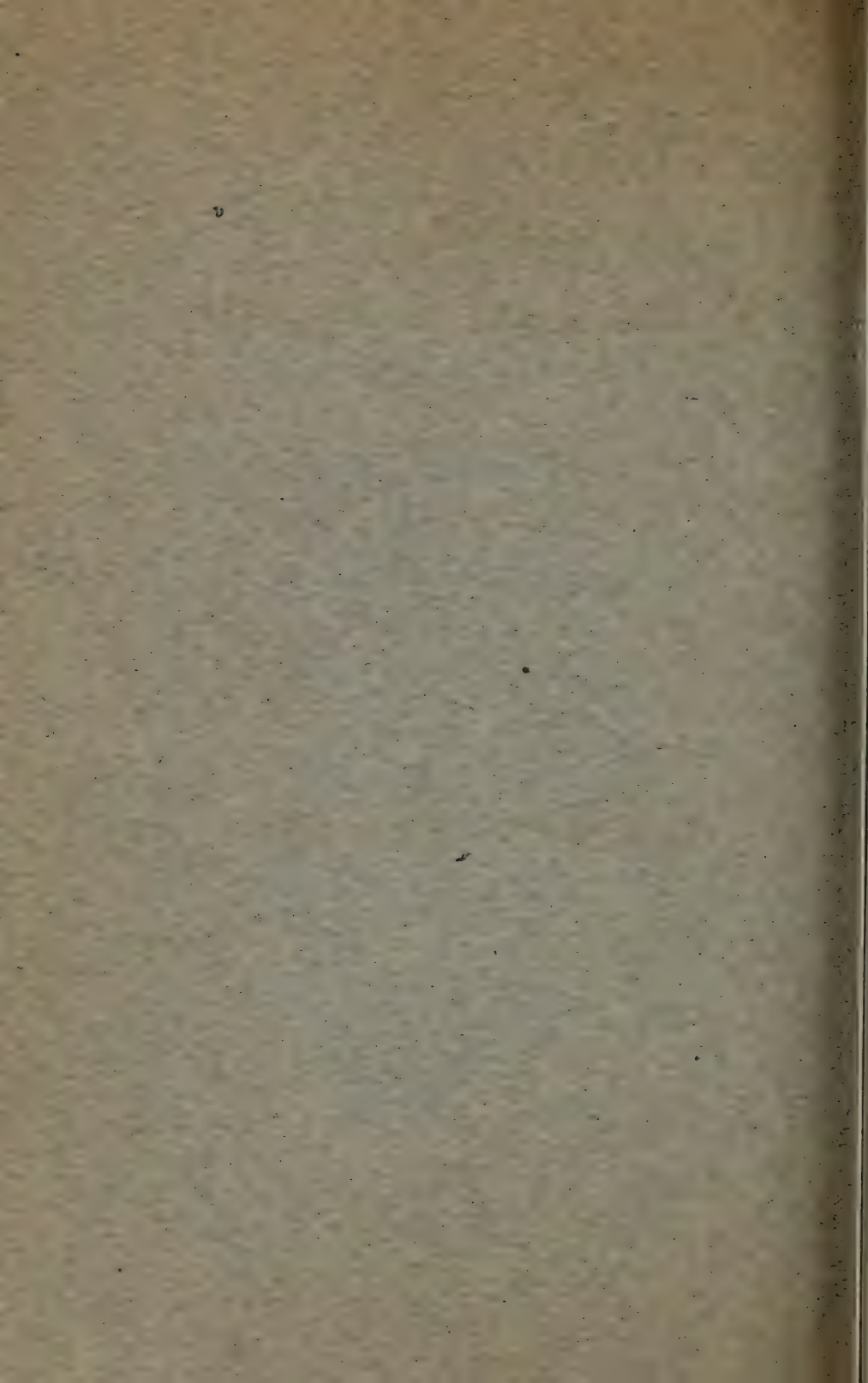
WALTER B. MITCHELL,
Attorney for Plaintiff in Error.
624 Rookery Bldg., Spokane, Wash.

Filed

AUG 25 1917

F. D. Monckton,

Clerk.



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

WALTER B. MITCHELL,

Plaintiff in error,

VS.

THE LELAND COMPANY, a Corporation,

FRANK LINN and THEODORE LELAND,

Defendants in Error.

Brief of Plaintiff in Error

*Upon Appeal from the United States District Court
for the District of Montana.*

STATEMENT OF CASE.

The defendant, the Leland Company, is a corporation duly organized and existing by virtue of the laws of the State of Montana, and authorized to issue stock of a par value of One Hundred Dollars

per share up to a capital stock of Twenty Thousand Dollars, and doing a general merchandise business in the City of Gardner, State of Montana; The said corporation duly issued Fifty shares of its capital stock to one S. O. Leland on the 20th day of September 1911, fully paid up and non assessable and being certificate number one upon the stock books of said corporation and the one in question in this case, exhibit 5 (Tr. p. 29). At that time the said S. O. Leland was president of said corporation and later he moved to Spokane, Washington, and on the sixth day of March, 1912, sold, assigned, transferred and delivered this certificate of stock to one E. C. Murphy for a valuable consideration.

On or about the 1st of may 1912, the said S. O. Leland entered into an agreement with said E. C. Murphy, wherein and whereby the said S. O. Leland obtained an equitable interest in and to said certificate of stock providing that the S. O. Leland preformed the conditions of said written agreement; thereafter and on the 20th of June, 1912, the said E. C. Murphy assigned his interest in and to said contract to one John E. Murphy, who made frequent demands upon said S. O. Leland to preform the said contract and was finally forced to bring an action in the Superior Court of the State of Washington, in and for the County of Spokane and being a court of record of said State of Washington to determine the rights of the parties to the matter in

question, personal service of process was had upon the said S. O. Leland and Amelia Leland, his wife, in Spokane County, wherein the said defendant were at that time residing, and upon the trial of said cause the Court rendered judgement in favor of the plaintiff and against the said S. O. Leland and wife on the 8th day of April, 1913, and the court further ordered execution to issue directed to the Sheriff of Spokane County to levy upon and seize and take into execution of said judgement any personal property of the said S. O. Leland and Amelia Leland, his wife, that might be found in Spokane County.

Pursuant to said direction of the court and by virtue of said execution the Sheriff of Spokane County, State of Washington, did levy, seize and take into his possession the certificate of Stock for Fifty shares of the Capital Stock of the Leland Company and being the certificate in question herein, and duly advertized and sold at Sheriff sale to the highest bidder all the rights, titles and interests, both legal and equitable, that the said S. O. Leland and Amelia Leland, had in said certificate of stock and upon said sale, the said interests of S. O. Leland and wife was sold to A. Coolin, who was the highest bidder therefore, and the said sheriff executed to said A. Coolin a bill of sale to cover the said interest and delivered the certificate itself to A. Coolin at the same time. (Ex. 10, Tr. p. 35).

A. Coolin having purchased the equitable interests that S. O. Leland had in and to said certificate of stock, proceeded and purchased for a valuable consideration all the legal rights, titles, and interests of E. C. Murphy in and to said certificate of stock, exhibit 6 (Tr. p. 30), and thereafter the said A. Coolin, duly sold, assigned and delivered all the rights, titles, and interests in and to said certificate of stock and the sheriff bill of sale of the interest of S. O. Leland and wife, to the plaintiff herein. Exhibit 7 (Tr. p. 31).

The plaintiff, Walter B. Mitchell, made a formal demand upon the said corporation, the Leland Company, and its president, Frank Linn, and Secretary, Theodore Leland, through his duly authorized agent at the place of business of the said corporation at Gardner, Montana, and presented the said certificate and demanded to have the same transferred upon the books of the corporation in the name of the plaintiff on the 29th day of November, 1914 and the said corporation through the aforesaid officers refused to make the transfer or recognize the plaintiff in any way, and therefore the plaintiff brought the present bill of complaint to compel the defendants and its officers to transfer the said stock to him upon the books of the corporation or in case that could not be done to recover the value thereof on or about the 24th day of May, 1915, and the defendant corporation by and through

its officers answered the bill of complaint; thereafter an amended bill of complaint was served and filed and this was also answered and reply made to the answer and upon the trial of this cause the defendants interposed a motion for judgment upon the pleadings and the court overruled the same and it was then and there agreed that the cause of action should be tried upon the original bill of complaint and answer of the defendants and in pursuance of this agreement in open court the said cause was tried as recited in the decree of the trial court. (Tr. p. 58).

Under the pleading upon which the said cause was tried, towit: the original bill of complaint and answer the defendant admitted all the allegation of the said bill of complaint except the fact of the value of the stock and denied the ownership of said certificate to be in the plaintiff but admitted the demand and refusal of the 29th day of November, 1914. (Tr. p. 7).

The trial court held that the plaintiff was not the owner of said stock and dismissed the said cause of action with costs to the plaintiff and therefore this appeal is taken from the ruling of the trial court. (Tr., p. 58).

ASSIGNMENT OF ERROR.

I.

The Court erred in holding the issues to be with defendants.

II.

The Court erred in holding that the title to the stock in question was not established in the plaintiff.

III.

The Court erred in holding that the plaintiff obtained nothing from the assignments of E. C. Murphy and A. Coolin of said certificates and sheriff bill of sale thereof.

IV.

The Court erred in holding that defendants has established any defense to the plaintiff's complaint whatsoever.

V.

The Court erred in prohibiting the complainant from introducing in evidence the Stock Books of the Corporation, for the purpose of showing that no transfer of any certificate of stock was ever issued to Theodore Leland.

VI.

The Court erred in permitting the witness S. O. Leland over the objection of the complainant to testify as follows: "That he had completed his contract with Murphy, deeded certain realty to Murphy and delivered Murphy a check for \$100.00, thereupon Murphy delivered the share certificate in question herein to him, immediately however, Murphy demanded other money from me and upon my refusal to pay, Murphy wrested the share certificate from my

hands, and thereafter on my repeated demand for it he assured me that it was lost" for the reason that even if the above evidence was true it was inadmissable in this cause as it was for the purpose of impeaching a judgment of the Superior Court of Spokane County and State of Washington, which was adjudicated against the said S. O. Leland, in said Court and it was wholly incompetent for a witness to attempt to contradict the said judgment, and this court was wholly without jurisdiction so to do, and for the further reason that it was a total surprise to the plaintiff and so claimed on the trial of said case, and thereby prevented the complainant of meeting any such testimony.

VII.

The Court erred in holding that the purchase of the certificate in question herein at sheriff sale in Spokane, Wash., amounted to nothing.

VIII.

The Court erred in holding that where a certificate of stock in a foreign corporation was owned by a resident of the State of Washington, and that owner had duly assigned the said certificate to another resident of State of Washington for a valuable consideration, and subsequently made a contract with the other resident in which the former owner was to pay a certain sum of money, etc., and upon doing so the said certificate was to be transferred back to him, and the said former owner having failed to so pay as agreed the holder of said certificate brought suit against the said former owner (who was still residing in the State of Washington) to enforce the contract for the

payment of the money and obtained personal service within the State of Washington upon said former owner, and the cause proceeded to judgment on said contract in favor of the holder of said certificate, whereupon the court directed execution to be issued and caused the sheriff to seize the said certificate under the Laws of the State of Washington, providing that any personal property of the judgment debtor within the jurisdiction of the Court may be seized and sold to satisfy the judgment, and the sheriff in pursuance of such execution did actually seize the said certificate in question and take the same into his possession and proceeded to sell according to the laws of the State of Washington, and the sheriff having sold the said certificate and all the rights, titles and interests of the judgment debtor in and to said certificate to the highest bidder at such sale and delivered to said purchaser a bill of sale thereof and also the certificate itself; and the Court erred in holding that under this state of facts the purchaser at such sale derived no title or claim in or to said certificate and no right to have the same transferred to said purchaser on the books of the corporation.

IX.

The court erred in holding that the cause of action for conversion was barred on the original complaint herein.

X.

The Court erred in holding that corporate shares can not be sold on execution save upon lawful levy upon the corporation.

XI.

The Court erred in holding the complainant is entitled to no relief and in not holding that complainant was entitled to the full relief prayed for herein.

XII.

The Court erred in not giving full faith and credit to the proceedings in Spokane, Wash., being the records of a court of record of the State of Washington, in violation of the constitution of the United States, Article 4, Sec. I.

ARGUMENT.

It will be unnecessary to discuss the assignments of error separately or to segregate them to any extent for the reason that most of the facts are conceded and the several assignments of error can be argued together and the court will readily see the application of the points, authorities and arguments herein made to the assigned errors.

It is conceded that S. O. Leland was the rightful owner of the certificate number one for fifty shares of the capital stock of the Leland Company, a corporation of the State of Montana, and being the certificate in question herein, exhibit 5, (Tr., p. 29), on the 6th day of March, 1912, and that the said stock was fully paid and non assessable at that time and that the said S. O. Leland on this day duly sold, assigned, transferred and delivered the said

certificate of stock to E. C. Murphy in Spokane, Washington, and that thereby E. C. Murphy became the owner and holder of said certificate and entitled to have the same transferred to him upon the books of the corporation in said E. C. Murphy's name.

It is further conceded that on or about the 1st of May, 1912, that E. C. Murphy entered into a written contract with S. O. Leland in Spokane, Washington, wherein and whereby the said S. O. Leland obtained an equitable interest in and to said certificate of stock in question herein, and the conditions of said contract was that providing the said S. O. Leland performed his part of said agreement that the said E. C. Murphy would then transfer said stock to him, and the said certificates was held by E. C. Murphy in the meantime.

It is further conceded that on the 20th day of June, 1912, that the said contract was not preformed and the said E. C. Murphy assigned the said contract to John E. Murphy for a valuable consideration, and that the said John E. Murphy was forced to bring suit upon said contract against S. O. Leland and Amelie Leland, his wife, in the Superior Court of the State of Washington, a court of record of said State of Washington, and that personal service was had upon the said S. O. Leland and Amelia Leland and that a personal judgment was rendered against them both on the 8th of april, 1913,

and that the trial court directed execution to be issued to the sheriff of said Spokane County, State of Washington, commanding said sheriff to levy upon, seize and take into execution any personal property found in Spokane County, State of Washington, that belonged to S. O. Leland and Wife, and pursuant to said execution, the said sheriff levied upon said certificate in question herein, seized the same and took the same into his possession and duly sold all the rights, titles and interests both legal and equitable that S. O. Leland and Amelia Leland had in or to said certificate of stock herein and thereby they were foreclosed out of the equitable interest obtained in and to said certificate of stock by reason of the said contract of May 1st, 1912. (Ex. 10, Tr., pp. 35,71, 74).

It is further conceded that neither S. O. Leland or Amelia Leland ever took any appeal or any other proceedings to reverse or alter said judgment or proceedings and that the time for such appeal or other proceedings has long since elapsed and therefore it follows that the said proceedings are a final adjudication of the rights of S. O. Leland and Amelia Leland in and to said matter by a court of record of the State of Washington, and as such, are entitled to full faith and credit of the Courts of the United States.

“Article 4, Sub. I, of the constitution of the United States. Full faith and Credit shall be given in each state to the public acts, re-

ords and judicial proceedings of every other state and the congress may by general laws prescribe the manner in which such acts, and proceedings shall be proved, and the effect thereof."

"As the judgment here relied upon was not a transaction based on any acts mentioned in section 993 of the New York Code, which is the only statute in that state which effects the validity of the judgments based upon gambling transactions it is not void, under the laws of that state, and being entitled under the constitution of the United States to the same faith and credit it would receive in the courts of the State of New York and is not subject to attack in this proceedings."

Carpenter vs. Beal M. Donnell & Co., 222 Fed., 453-461.

Roller vs. Muury, 234 U. S. 738.

It is true that the trial court allowed the said S. O. Leland over the objection of the plaintiff to testify to matter which if true was intended to impeach the said Washington judgment (Tr., p. 76) but in doing so the trial court erred, and in the appeal of this case the court should not take said testimony in consideration, for it is wholly incompetent and immaterial and the said S. O. Leland is estopped from disputing the said judgment or proceedings in any way, and for the further reason, that it, was not one of the issues as framed by the pleadings and could therefore not be considered in this action.

The trial court held that corporate shares could not be sold save by lawful levy upon the corporation, and must have had the view that certificates of stock in a foreign corporation that may be found outside the state they are issued in were subject to the laws of that state governing attachments of domestic stock but the law upon that subject is as follows:

“The delivery of a stock certificate of a corporation to a boni-fida purchaser or pledgee for value together with a written transfer of the same or written power of attorney to sell, assign and transfer the same signed by the owner of the certificate, shall be sufficient delivery to transfer the title as against the creditors of the transferrer and subsequent purchasers, etc.”

Section 3855, Revised Code of Montana.

“Shares of stock are to be treated as personal property transferable by indorsement and delivery and the rule which most encourages its transfer and gives the certificate as nearly as possible the character of commercial paper will best subserve the public interest.”

National Bank vs. Gas & Fuel Co., 6 Wash. 597, 34 Pac. 155.

“It is next insisted that the judgment of the snpreme court of New York was void because the plea interposed by the defendant showed that the stock to which the suit in New York related was the stock of a New Jersy corporation, over which the courts of New York could exercise no jurisdiction or control. The rule of law is not disputed that, in a suit com-

menced and prosecuted upon constructive or substituted service of process, the courts of a state or country may lawfully adjudicate on the title to real or personal property situated within its borders, or upon liens or claims against property which is so situated, providing they are authorized to do so by local statutes. *Arnut V. Griggs*, 134 U. S. 316....., It is contended, however, that this rule has no application to the stock of a foreign corporation, that stock certificates are mere evidence of the ownership of stock, and that the stock of a corporation can have no situs outside of the state in which the corporation was created. Speaking, technically, it is true that stock certificates is written evidence of a certain interest in corporate property. The same may be said of notes and bills. They are simply evidence of indebtedness on the part of the individuals or corporations who issue them. But in the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inhearent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

"In view of the foregoing consideration we are of the opinion that stock certificates are personal property within the purview of the foregoing statute, and that when such certificates are held in pledge, or as collateral, within the state, the court of that state have jurisdiction to establish the existance of a lien thereon, and to enforce the same by directing a sale of the property."

Merritt vs. American Steel Barge Co., 79 Fed. 228, (234,235,236).

“Certificates of Stock in a foreign corporation are personal property, and, when in the hands of third parties within this state, are subject to garnishment”.

Puget Sount Nat. Bank vs. Mather, 62 N. W. 396.

“It is held that certificates of stock in a foreign corporation belonging to a non resident, but held by a resident as pledges, are subject to attachment in a suit against the owner and in this case the court said, certificates of stock are treated by business men as property for all practical purposes, they are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property, they pass by delivery from hand to hand and they are subject of larceny.”

Simpson vs. Jersey City Contracting Co., 58 N. E. 896.

People vs. Grefendagen, 152 N. Y. Supp. 679.

“Coupon railroad bonds belonging to non residents of Maryland are subject to attachment in this State, provided the bonds themselves are located here, whether the railroad that issued the bonds are domiciled in Maryland or elsewhere.”

Francois De Bearn vs. Louis Elis Joseph Henry, et al., 81 Atl. 223.

“Shares of Stock in a foreign corporation are taxable as property to the owner, where he is resident within the commonwealth, although the place of business and the whole property

of the corporation are in another jurisdiction and are treated as personal property."

Bellows vs. Fall Power Co. vs. Commonwealth, 109 N. E. 891.

"Within the provision of the bankruptcy act giving jurisdiction to the court within whose district the alleged bankrupt has property, and it does not have its principal place of business, reside or have its domicile within the United States, corporate stocks and bonds certificates pledged within a district, and balance in an account with a trust company therein, was property within the district."

In Re San Antonio Land and Irrigation Co., 228 Fed. 984.

"Certificates of stock in corporations, properly indorsed and delivered as securities to a trustee with power of sale in case of default in the trust agreement, are property, having the situs at the place of business of the trustee."

Blake vs. Torman Bros. Banking Co., 218 Fed. 264.

"The surrender of a certificate of stock to one not entitled to it, who procures its cancellation and the issuance of a new certificate to himself, amounts to a conversion of the stock."

Haley vs. Haley, 15 Wash. 678, 47 Pac. 23.

"Where Idaho County warrants, the property of an Idaho banking concern, are pledged in New York City prior to the appointment of receiver for the bank in Idaho, they are liable to seizure, in an attachment proceeding *****.

The warrants had a situs in New York, were subject to the same rule as other personal property of like character, and were liable to seizure and sale under writ of attachment."

Thum vs. Pingree, 61 Pac. 18.

"While the corporation is still in legal existence, the stock of the corporation is personal property, and may be transferred as personal property, and the owners of that stock have no interest in the land which can be taken by any process known to the law."

Princeton Min. Co. vs. First Nat. Bank, 19 Pac. 210 (Montana case).

Manifestly from the foregoing authorities shares of stock in a foreign corporation are subject to levy of attachment or execution where as in the instant case the certificates themselves are within the borders of the state wherein the same are attached or execution levied thereon, and further that shares of stock are personal property and the certificates themselves are personal property within the meaning of the statutes and are so held to be for all practical purposes and especially is this so in the State of Montana wherein it holds that shares of stock are personal property and may be transferred as personal property and that it is not necessary to even have the same transferred upon the books of the corporation in order to pass title and therefore under the Montana laws shares of stock are practically negotiable and would be considered the

same as a promissary note and there can be no dispute but what a promissary note can be seized into execution and sold where ever found as personal property.

Since certificates of stock in a foreign corporation are therefore subject to execution or attachment outside the state, wherein it was issued, it naturally follows that the laws of that state which governs the attachment of domestic corporation does not apply for the reason that the courts do not have any jurisdiction to issue any process outside of the state wherein it resides and therefore the seizure must of neccessity be had upon the certificate itself, without reference to the domicile of the corporation, which issued the same and without any process being served upon said foreign corporation and therefore the trial court erred in holding that corperate shares of a foreign corporation cannot be sold on execution save upon lawful levy upon the corporation.

The laws of the State of Montana and Washington as to executions are as follows:

“All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interest in any corporation or company, and debts and credits, and all other property, both

real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution."

Revised Code of Montana, Section 6821.

"All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution."

Rem. & Bal. Code of the State of Washington, Section 518.

"Equitable interest in land can be sold on execution under the statutes of this state."

Calhoun vs. Leary, 6 Wash. 17, 32 Pac. 1070.

"A set of abstract books are subject to sale on execution under above statute."

Washington Bank of Walla Walla vs. Fidelity Abstract & Security Co., 15 Wash. 487, 46 Pac. 1036.

"Any interest, therefore, in land, legal or equitable, is subject to attachment or execution, levy and sale. (*Fisk vs. Fowlie*, 58 Cal. 273), and this court had held that under section 5200, Bal Code, which provides that all property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution.

Equitable as well as legal estates may be sold on execution."

State Ex. Rel. Trimble vs. Superior Court,
31 Wash. 445, 72 Pac. 89, 193.

"It is the law of the State of Washington, that where the sheriff sell personal property under execution sale that all that he sell is the real interest of the judgment debtor therein."

Ranson vs. Wickstrom & Co., 84 Wash., 146
Pac. 1041.

Therefore the purchaser at the execution sale of this certificates in question herein obtained all the rights, titles and interests of S. O. Leland and Amelia Leland and by them purchasing the rights, titles and interests of E. C. Murphy therein, he became the legal and equitable owner of said certificate of stock free and clear from any claim of right, title or interest of the said S. O. Leland or Amelia Leland, his wife, and when he in turn sold transferred and delivered his rights, titles and interests to the plaintiff, the said plaintiff became the owner and holder of said certificate of stock and was entitled to have the same transferred upon the books of the corporation and the trial court erred when he held the contrary as he did upon the trial of this case. (For assignments see Tr., pp. 30, 31.

The trial court further held that the cause of action for conversion as set forth in the original

bill of complaint was barred by the statute of limitations of the State of Montana, Section 6449 of Revised Code, Seb. 3 of 1907, but that statute provides that the limitation is two years, and in the instant case the plaintiff alleged in paragraph five of his bill of complaint:

“That the plaintiff had made frequent demands upon the said defendant corporation for the transfer of said stock and have received no reply whatsoever and finally on the 29th day of November, 1914, the plaintiff through his authorized agent presented the said stock together with the proper assignments hereof to the said corporation at its office in Gardner, Montana, and demanded that it be transferred upon the books of the corporation in the name of the plaintiff, and the defendants through its officers refused to so transfer the same and still refuses to transfer the same to injury and damages of the plaintiff in the value of said stock and in the dividends of the same.”

The defendants admits paragraph 5, in its answer to the bill of complaint and therefore concedes that the demand was made on the 29th day of November, 1914, thus since this action was commenced within seven months after that, and the statutes provides for two years before claim is barred, the trial court erred in holding the same barred. And it is further conceded from the evidence herein that the said stock was worth \$5,825.32 at the time of this demand. (Tr., p. 13).

The trial court in his written memo herein, (Tr., p. 56) gives his decision and bases the same upon the testimony of S. O. Leland, which I have pointed out heretofore in this brief was wrongfully admitted and in that connection, I wish to call this court's attention to the answer of the defendant to the amended complaint herein (Tr., p. 17) where it shows that the defendant claimed that S. O. Leland had obtained a new certificate issued to him in lieu of the one in question here, on the grounds that the old one was lost and that he had sold the new certificate to Theodore Leland, his brother, who was the secretary of the Leland Company and who was one of the officers who refused to issue the stock to the plaintiff herein.

The stock books of the said corporation showed that no such certificate was ever issued and also showed that no share of stock of said Leland Company was ever issued to Theodore Leland (Tr., p. 75) and upon the trial of this cause, the defendants attorney, as soon as they discovered this fact, abandoned the defense and refused to introduce the stock book in evidence, and when the plaintiff offered the same the court sustained the objection of the defendants to the introduction of the stock books, and in this the plaintiff claims the court erred for the stock book was very material to the plaintiff, as it showed a complete frame up on the part of the defendants to deceive the court and an

attempt to present a false defense, and one known to be false, and since the said Theodore Leland never appeared at the trial, but in his place and stead, the said S. O. Leland was called and he, in turn attempts to manufacture a story to defeat and impeach the Washington judgment, and since the answer was false, the testimony of the said S. O. Leland was discredited even if it were admissable in this cause for any purpose whatsoever. S. O. Leland therefore did not claim to own the said certificate in question and was a witness in said cause trying to prove the title was in Theodore Leland, and therefore he is forever estopped, to ever claim the title himself, and since the story told about the transfer to Theodore Leland was false, and Theodore Leland was made a party hereto, as secretary, and made no claim to said stock individually, except what is contained in the answer of the corporation, the corporation could not have been justified in going to the length it did to defeat the plaintiff's title and when it undertook to falsely defeat the title of the plaintiff, it stepped outside the doors of a court of equity and the court erred in holding the issues to be with defendants.

On page 22 of the transcript of record there appears in the Minute entry of the clerk of the District Court the statement that F. O. Leland testified for the plaintiff and that is an error of the clerk as this name should be Frank Linn who

was called by the plaintiff to identify the books of the corporation and it further appears that Theodore Leland was called for the defendants and this is error as it was S. O. Leland, as Theodore Leland was not at the trial at all.

The trial court further erred in holding (even taking for granted that S. O. Leland's testimony was admissible) that the handing of a certificate of stock to another, without any written power of attorney or transfer, passed title to said stock to that other, for the statute of the State of Montana, Section 3855, providing how the title to stock can be passed expressly provides:

“The delivery of a stock certificate of a corporation to a boni-fida purchaser or pledgee for value together with a written transfer of the same or written power of attorney to sell, assign and transfer the same signed by the owner of the certificate—”

And the statute providing that a written transfer must be made, and in the instant case, that is lacking, then the title of the stock never passed if S. O. Leland's testimony is true and on cross examination S. O. Leland (Tr., p. 77) admitted that the certificate was presented to him and payment demanded in Washington, before judgment was taken against him, and he refused to make payment, therefore there could not have been any title pass to S. O. Leland at all and the title then was left in E. C. Murphy and the assignment from him did possess

rights and the trial court erred in holding that it did not.

The conclusion of the foregoing therefore is that S. O. Leland parted with the title to the certificate in question when he transferred the same to E. C. Murphy on the 6th day of March, 1912, and never thereafter obtained the title to said stock, the nearest he came to it was when he made the contract and aquired an equitable interest therein providing that he fulfilled the contract and when he failed and refused to so do, as found by the court in the State of Washington, after obtaining jurisdiction over said S. O. Leland and Amelia Leland and also over the certificate itself and the equity of these parties was sold in due manner, then they and each of them were forever foreclosed of any claim, right or title in and to said certificate in question herein, and the title to said certificate by reason of this sale and assignments, became vested in the plaintiff and he was entitled to the transfer of the same upon the books of the corporation and the trial court was in error in not holding that to be the fact and granting judgment in favor of the plaintiff.

I submit that the judgement made and entered in the above entitled cause should be reversed and this court direct the lower court to enter judgment for the plaintiff for the transfer of said stock to the plaintiff and if the value of said stock at the

time of the said judgment being entered is less than the value of it was at the time of demand for transfer, to-wit November 29th, 1914 then and in that case the plaintiff to have judgment for the difference and should the stock not be transferred then the plaintiff should have judgment for the value of it at the time of the demand.

Respectfully submitted.

WALTER B. MITCHELL,
Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WALTER B. MITCHELL, Appellant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND, Appellees.

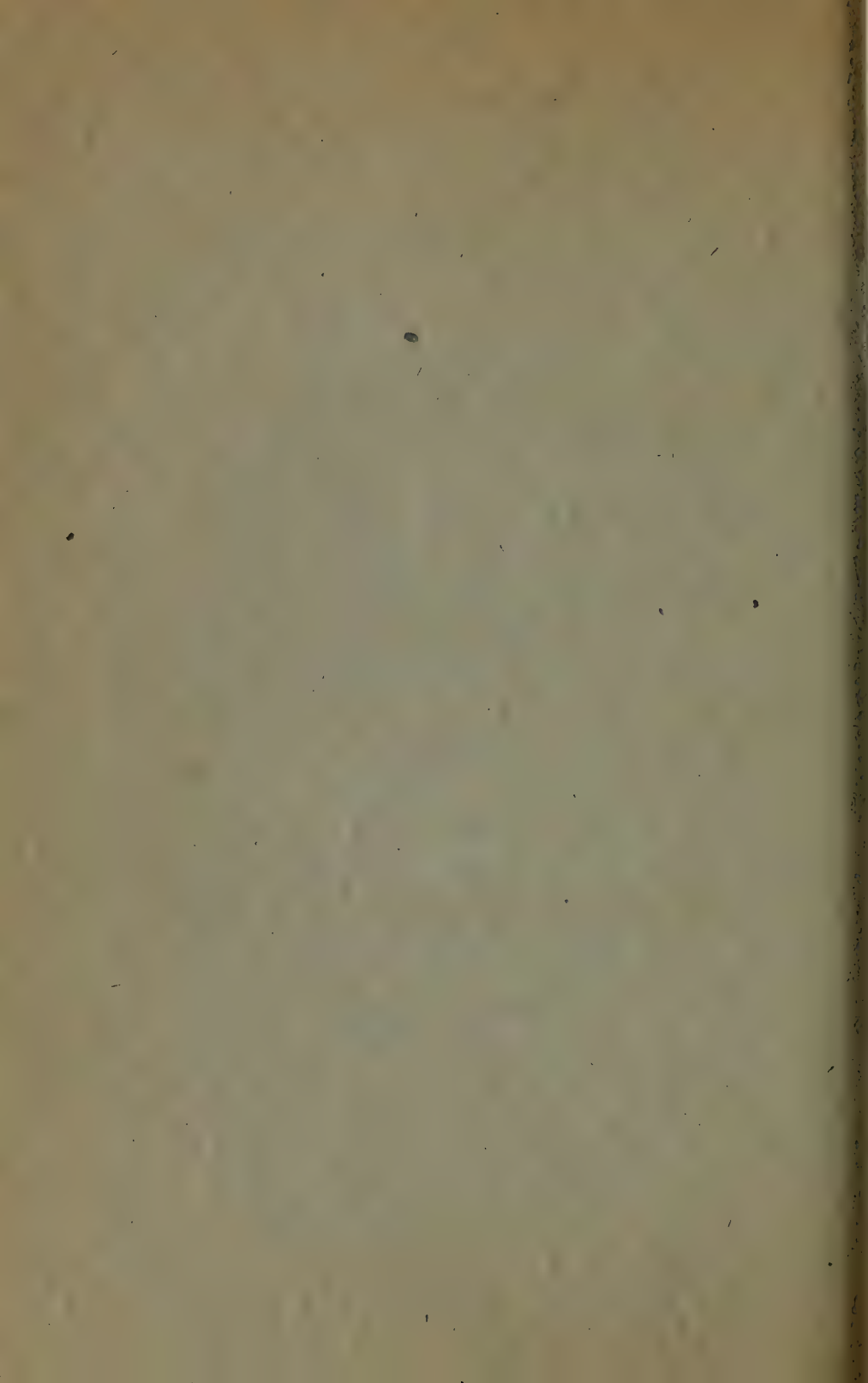
Brief of Appellees

Upon Appeal from the United States District Court
for the District of Montana.

Filed

SEP 12 1911

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IN THE
United States
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THE LELAND COMPANY, a Corporation,
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Brief of Appellees

Upon Appeal from the United States District Court
for the District of Montana.

This suit was originally brought as an equitable action to compel the defendant corporation to transfer upon it's books fifty shares of stock of the corporation to the plaintiff. Later by stipulation the plaintiff was permitted to file an amended complaint and he did so but changed the nature of the action to one at law for the conversion of the stock.

Upon the trial it appeared to the court that the action for conversion was barred and the action was tried as if it were an equitable action and as though upon the cause set out in the original complaint. (Tr. 58).

From the testimony given at the trial it is shown that the certificate of stock was transferred to E. C. Murphy by S. O. Leland in a trade for some real estate in March, 1912 and that in May, 1912, he and Murphy entered into a written contract for the return of the certificate to Leland upon the transfer of the real property to Murphy by Leland. (Tr. 76). This contract is set forth in the Transcript at pages 53, 54, 55.

This agreement was carried out and S. O. Leland completed his contract with Murphy and Murphy delivered the certificate to him but upon the refusal of Leland to pay other money Murphy grabbed the certificate, and thereafter upon demand for it by Leland Murphy assured him it was lost. (Tr. 77).

The certificate had never been presented by Murphy for transfer on the books of the corporation and the trial court held properly that any right or title of Murphy in the certificate was transferred back to Leland and that he obtained no title thereto by his act of trespass in seizing it after it's delivery to Leland. See Memorandum Opinion of District Court Transcript page 56.

Murphy thereafter had no interest in the certificate

that he could assign and of course the plaintiff obtained no interest by the assignment to him. And in passing it is well to observe the multiplicity of assignments all apparently designed to further an attempt to get five thousand dollars of corporate stock for an alleged debt of one hundred dollars. E. C. Murphy assigned his interest in the contract with Leland to one John E. Murphy on June 20, 1912, as set forth in the complaint which is a part of the judgment roll introduced by the plaintiff as an exhibit. (Tr. 39). And if it should be argued that E. C. Murphy had a right to retain the stock certificate, taken as it was by him tortiously, as security to enforce the payment of the hundred dollars alleged to be due him from S. O. Leland for the piano as mentioned in the contract, then it must be noted that the assignment of a contract or instrument for the payment of money carries with it the incident of the security and therefore of course E. C. Murphy, even under such theory, untenable as it is, had no interest in the certificate to assign to A. Coolin, plaintiff's assignor, on May 22, 1913, the date plaintiff avers such assignment was obtained by Coolin "for the purpose of clearing up any rights or interest that E. C. Murphy had in said stock". (Tr. 21). And no assignment of the stock was ever obtained from John E. Murphy. And any lien of E. C. Murphy on the certificate—even assuming that he could obtain a lien by his act of trespass in regaining possession of the certificate—would be waived by the surrender of it to the Sheriff and the attempted and purported levy upon it under the writ of execution from the Superior Court of Spokane county, Washington.

So the whole matter resolves itself into the question whether the purchaser at the so-called execution sale of the certificate at Spokane, obtained thereby any owner-

ship of the shares of stock in the defendant corporation represented by the certificate.

It is essential to a clear view of the question that the nature of shares of stock and stock certificates be kept in mind.

"A certificate of stock is from one point of view a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the stockholder in the corporate property and franchises. It operates to transfer nothing from the corporation to the stockholder, but merely affords the latter evidence of his rights. It should be clearly understood that THE CERTIFICATE IS NOT THE STOCK but merely written evidence of the ownership of the stock."

Cook Corporations, 8th ed. Vol. 1, Sec. 13.

"Broadly speaking, a share certificate is merely the paper representative of an incorporeal right of a stockholder. It stands on a footing similar to other muniments of title. In other words, the act of subscribing for the shares gives title to the subscriber, and the certificate neither constitutes nor is necessary to it; it is only evidence of title."

Thompson Corp. 2nd. Ed. Vol. 4, Sec. 3455.

Cotter vs. B. & R. V. S. Co., 31 Mont. 129.

With the distinction clear in mind between the shares of stock and the certificate which is the evidence of the ownership of the shares, the next question to consider is where is the situs of such shares of stock for the purpose of determining how, and where levy thereon may be made by creditors.

The Supreme Court of the United States has held that "the certificates are only evidence of the ownership of the shares and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it,

the property represented by the certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is the real owner."

Jellenik vs. Huron C. M. Co., 177 U. S. 1; 44 L. Ed. 647.

The statutes of Montana prescribe how stock in it's corporation may be levied upon by attachment and execution.

"Stocks or shares, or interest in stocks or shares of any corporation or company must be attached by leaving with the president or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ."

Sub. 4 Sec. 6662 Rev. Codes Montana, 1907.

And the statute provides that shares and interests in corporations may be levied upon under execution in like manner as provided for attachment.

Sec. 6821 Rev. Codes Montana, 1907.

"The authority of the state to establish such regulations in reference to the stock of a corporation organized and existing under it's laws cannot be doubted."

Jellenik vs. Huron C. M. Co., 177 U. S. 1; 44 L. Ed. 647.

The power of the state of Montana to enact such laws regulating the manner in which stock in it's corporations may be levied upon by execution is declared by the Supreme Court of the United States in the above decision.

When the statute prescribes a mode of levy upon shares of stock in a corporation the mode prescribed must be substantially followed or the sale will be void, and the purchaser will get no title.

Thompson Corp. Sec. 5842.

Wells vs. Price (Idaho) 56 Pac. Rep. 266.

Ellis vs. Gibbons (Colo.) 145 Pac. Rep. 285.

And in the absence of statute shares of stock in a corporation are not subject to execution.

Cook Corp. Sec. 480.

Indeed counsel has not cited any statute of the state of Washington providing the mode of levy upon stock in a corporation and he has cited no statute of Washington authorizing the levy of an execution upon shares of stock in a foreign corporation.

The Washington court said in a case decided in 1902, "We have no law in this state authorizing the sale of the stock of stockholders of a foreign corporation doing business in this state on an execution issued on a judgment in this state against the stockholders of such foreign corporation."

Daniel vs. Gold Hill M. Co., 68 Pac. Rep. 884.

And the court held in the same case that stock in a corporation cannot be seized on execution and sold unless authorized by an express statute, and where such sale is authorized, the authority only extends to the stock of the corporations existing in that state and not to those of other state.

The statute of Washington authorizing the sale of stock in domestic corporations is very like the statute of Montana cited above.

"Shares of stock cannot be taken on execution or attachment by levying upon or seizing the certificate of stock, and a court can acquire no jurisdiction over stock by virtue of an attachment merely because the certificate of stock is within it's jurisdiction."

Clark & Marshall Private Corp. Sec. 378h.

It seems so clear that the process of the court of the state of Washington cannot reach beyond the confines of that state into Montana and seize Montana property that to multiply citations is needless. The authorities cited by counsel are not in point. When a certificate of stock is

pledged as security or collateral or held under an agreement for a lien thereon any sale made of it by the one holding it under such agreement is made under an agreement. The stock is sold under authority from the owner. But in the case of sale under an execution the owner does not voluntarily part with his stock or authorize its sale. The strong hand of the law reaches out and seizes it without his consent and in so doing the mode prescribed by law must be followed or the purchaser gets no title. The cases cited by counsel appear to be cases, where even remotely bearing upon the point, of certificates of stock sold to satisfy liens or sold by pledge holder or sold where held as collateral.

It is contended that the court erred in permitting S. O. Leland to testify to the transaction between him and E. C. Murphy involving the stock certificate and the reasons assigned are that such testimony constituted an impeachment of the judgment of the court of Spokane county, Washington. The mere statement refutes the contention. The judgment in question purports to adjudge that S. O. Leland at the time of the rendition of the same was indebted to John E. Murphy, assignee of E. C. Murphy, in the sum of \$105.50 and \$17.00 costs. It is simply a money judgment and how the testimony of S. O. Leland impeached it in any way is beyond comprehension. It is also contended that the testimony was a surprise to the plaintiff. The answer of defendants to the amended complaint sets forth the fact of the rescission of the contract whereby Leland traded the stock to Murphy for certain real and personal property and alleges fully that from the time of the making of the contract of rescission about May 1st, 1912, Leland again became the owner of the stock. So there was no surprise and in any event the law is well settled that where the plaintiff to recover must

prove his ownership of personal property the defendant may introduce any testimony rebutting such proof of ownership; he may prove ownership in himself or in another person and the plaintiff must recover on the strength of his own title. This is true in actions of replevin and conversion and in actions like the case at bar. It is the rule of decision and practice in Montana that any fact going to defeat plaintiff's claim of ownership may be proved even under a general denial. In this case though the facts were pleaded in the answer.

Gallick vs. Bordeaux, 22 Mont. 470; 56 Pac. 961.

Kaufman vs. Cooper, 38 Mont. 6; 98 Pac. 504.

The findings and decision of the trial court were made after hearing the testimony in full, the transcript showing only the barest syllabi of it. The appellant has shown no reason for a reversal of the decision. The burden is, of course, upon him to show some prejudicial error affecting his substantial rights. None has been shown and it is respectfully submitted that the judgment should be affirmed.

FRED L. GIBSON,

Attorney for Appellees.
National Park Bank Bldg.,
Livingston, Montana.

No. 2932

United States
Circuit Court of Appeals
For the Ninth Circuit

WALTER B. MITCHELL,
Appellant,

vs.

THE LELAND COMPANY, a Corporation
FRANK LINN and THEODORE LELAND,
Appellees.

Reply Brief of Plaintiff in Error

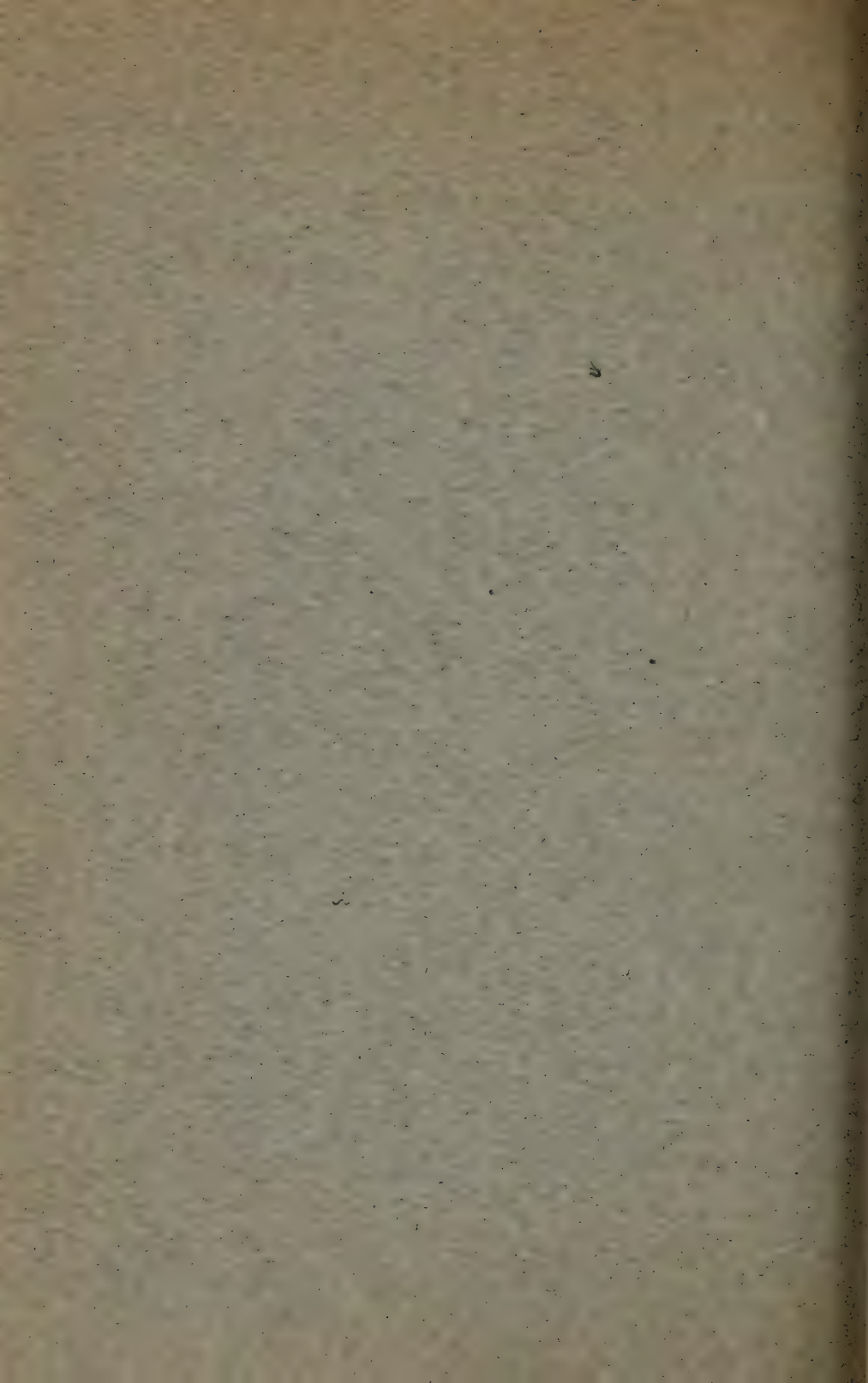
*Upon Appeal from the United States District Court
for the District of Montana.*

WALTER B. MITCHELL,
Attorney for Plaintiff in Error.
624 Rookery Bldg., Spokane, Wash.

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United States
Circuit Court of Appeals
For the Ninth Circuit

WALTER B. MITCHELL,
Plaintiff in Error,

vs.

THE LELAND COMPANY, a Corporation
FRANK LINN and THEODORE LELAND,
Defendants' in Error.

Reply Brief of Plaintiff in Error

*Upon Appeal from the United States District Court
for the District of Montana.*

Counsel for appellees says: "The action was tried as if it were an equitable action and *as though* upon the cause of action set out in the original complaint." Giving as authority for said statement (Trans., p. 58). But at that place it says: "The action was thereupon tried as if it were an equitable one and *on the cause of action* set out in the original

complaint plaintiff agreeing thereto", and evidently counsel misstated this intentionally in order to lay the foundation for the rest of the remarks he makes in his brief in regards to the unsupported allegations of the ammended answer herein. The abstract of the testimony, (Trans., p. 71), and decree of the trial court, (Trans., p. 58), shows that the cause of action was tried on the original bill of complaint and answer thereto and that is conclusive upon appeal of this cause, and it further shows that the appellees abandoned the said ammended answer and introduced no evidence to prove the allegations thereof and even objected to the introduction of the stock books in evidence to avoid the effect of the false allegations of the said ammended answer to-wit: (Trans., p. 17)

"The said S. O. Leland was the owner of and entitled to the possession of the said certificate of stock and the shares of stock therein mentioned, and that on or about the said last-named date the said S. O. Leland procured from this defendant corporation the issuance of a certificate of stock for the said fifty shares of stock then owned by him in said corporation in lieu of the certificate hereinabove mentioned, and thereafter on or about said last-named date sold, assigned and transferred the same to Theodore Leland, one of the defendants herein named, who is now and at all times since said last named date has been the owner of the said fifty shares of stock."

The stock books of the corporation showed that

there never was any such transaction and that no new certificate was authorized to be issued by the minutes of the meetings and stock books as well, (Trans., p. 75), and further the abstract of the testimony shows no testimony of Theodore Leland as he was not even at the trial of said cause for he well knew the falsity of the said allegation and was afraid to be present, and thus this corporation took that means to first defeat the appellants cause and when the stock books were about to be introduced in evidence the said corporation objected, and the grounds of the court holding that they were inadmissible was that the defendants had abandoned their amended answer and therefore it was immaterial. Notwithstanding this and the fact that the appellees never made any amendments to the abstract of the testimony as certified to by the court he says:

“The findings and decision of the trial court were made after hearing the testimony in full, the transcript showing only the barest syllabi of it.” (Appellees Brief, p. 8).

and would thus insinuate that the abstract was not complete in substance, but the integrity of counsel in these statements is best observed from the fact that he stood by with knowledge of the appellants abstract testimony and allowed the trial court to certify the same without amendments and without

any complaint whatsoever so now he is foreclosed of any objection.

Counsel knowing that he could never prove the title of said certificate of stock to be in Theodore Leland's name, undertook upon the trial of said cause to impeach the Washington Judgment in order to defeat the appellants title by having S. O. Leland dispute the same and this is every bit of evidence that was introduced by them in any way on this subject. (Trans., p. 76).

“The witness was then asked to explain what occurred between him and E. C. Murphy in reference to the return of the certificate and the preformance of the above mentioned contract.” Plaintiff objected to any testimony on this subject for the reason that it was an attempt to impeach the judgment of the Superior Court of Spokane County, State of Washington, a court of record of that state, and not one of the issues raised by the pleadings, and for the further reason that the witness was personally served with process in said proceedings in Spokane, Washington, had his day in court and made no effort to appeal from said decision, and the time for appeal has since lapsed, and that witness would be estopped to introduce testimony to impeach said judgment; and for the further reason that the matter was fully adjudicated and this testimony was immaterial and incompetent in this proceedings; and for the further reason that it was a total surprise to the plaintiff not having been plead in any way and would prohibit the plaintiff from rebutting the same”.

The trial court over-ruled the objection and S. O. Leland testified in substance that he had completed his contract with Murphy and that Murphy had given the stock certificate to him without any written transfer and grabbed it back and counsel for appellees would now say to this court that such testimony could not impeach the judgement for it was only a money judgment, (Appellees Brief, p. 7), but in this as well as the other misrepresentations he makes he is wrong, for this testimony if true would have been a defense to the cause of action as tried in the Washington courts for if S. O. Leland had completed this contract he could have forced the transfer of the said certificate of stock to himself, and prohibited this judgment from being entered at all, and the very fact that he admits that he allowed the said suit to go by default and that he knew that the certificate was in possession of Murphy at the time of said suit, (Trans., p. 77), is sufficient to stamp his story now, when he knew that Murphy could not have been produced to contradict him upon the trial of this cause as absolutely false and unbelievable and especially so under the false allegation of the amended answer as set forth on first page herein, and not only false but absolutely inadmissible as it directly attacks the said Washington judgment collaterally and that was error of the trial court to allow the same to be done and to form his conclusions and base his decree upon the same.

The said S. O. Leland and Murphy had some confessed claims against each other and made a settlement of said claims by entering into a contract, agreeing to do certain things, providing the other done certain things and in case that each complied with the contract that it would be a final settlement between them, (Trans., pp. 53, 55), how does it then make a security contract or how could Leland claim it was trespass if E. C. Murphy handed him the certificate in question without any written transfer thereof, that would not constitute an assignment of the stock to him under the Statute of the State of Montana and the learned counsel recites authority on the 5th page of his brief which says the statute must be complied with to pass title, and this contract recites that certain expenses were to be paid by S. O. Leland in case certain things happened and left legitimate grounds for a dispute to arise over the amount to be paid and S. O. Leland admits that he refused to pay anything, so if there was a dispute arose, as claimed by S. O. Leland, and his testimony was even true on this matter, the mere fact that he was shown the certificate and had the same in his hand and he had gave a check for part of the amount claimed due and by reason of this dispute the whole proposed meeting and attempted consummation of the said contract was postponed and delayed and E. C. Murphy refused to transfer the said certificate to S. O. Leland, and S. O. Leland took back

his check, would that constitute a trespass or tortious act upon the part of E. C. Murphy and would that constitute a complement of said contract, of course not, it would leave the parties just as they stood before the attempted consumation, and under any circumstances the said S. O. Leland would have to litigate that question in the Washington suit as he could not now attempt to litigate it in the instance case.

“The rule is that, in an action between the same parties, a judgment therein is *res adjudicata* as to all points in issue, and also all points which might have been raised and adjudicated”.

Hawkins vs. Reber, 81 Wash., 82, 142, Pac. 432.

And further S. O. Leland does not claim to own the said certificate now and the proof shows that the claim of Theodore Leland is false and then what does the said corporation have to do with the title to said stock and right to refuse to transfer it to the appellant as it is not its duty to plead false defenses to defeat the issue of the certificate of stock in question to the appellant, of course none, whatsoever and the force of their argument therefore fails as it has no right to protect.

The contract of May, 1912, then was not a rescission at all and S. O. Leland had sold this stock to E. C. Murphy on the 6th of March, 1912, and delivered this certificate properly signed, transferring the

same to said E. C. Murphy, not as security, but as an absolute sale and transfer thereof and in the State of Washington and S. O. Leland then had no title, right or interest therein in any way to said certificate of stock from that time on, and the contract of May 1912, recites as follows: (Trans., p. 54): That E. C. Murphy

“Agrees to transfer and deliver to the said party of the second part the fifty shares of stock in the said Leland Grocery Co., in consideration of which the second party does hereby agree”, etc.

Now then, if S. O. Leland completed this contract as he says, he was entitled to have the said certificate transferred back, but if he did not, he was not entitled to the said certificate at all, no security at all, and no vested rights, and only the equitable right to inforce the said transfer of the certificate, providing, he should complete the contract and the courts of Washington obtained jurisdiction over him personally and had jurisdiction then over the subject matter of this Washington contract between E. C. Murphy and S. O. Leland and determined that S. O. Leland did not complete his contract and accordingly, if he did not, he was not entitled to the transfer of said stock and the court further ordered execution to issue to the Sheriff of Spokane County to seize and sell this equitable right that S. O. Leland possessed by reason of this contract of May

1912, and thereby the equitable interest of S. O. Leland was forever foreclosed and S. O. Leland says that he went away to California in the middle of May, 1913, and has resided there since, (Trans., p. 77), and if he had any defense whatsoever to the said action this man would never have left and allowed the Washington Court to do that, and the fact that he went to California and dismissed the matter from his mind, should convince this court of his lack of integrity in his statements now.

It therefore follows that this case does not resolve itself upon the question only of whether the purchaser at the so-called execution sale of the certificate at Spokane, obtained thereby ownership of the shares of stock in the defendant corporation represented by the certificate, for the title to said certificate of stock in question was always from the 6th of March, 1912, in the assignors of the appellant and the attempt of the said appellees to establish it in S. O. Leland or Theodore Leland, failed and appellant is not trying to prove his title by the weakness of appellant claim and therefore the cases cited by counsel, (Appellees Brief, p. 8), would be applicable to the appellees and the evidence by which the appellees attempted to prove their contention was wholly incompetent and immaterial and under the law cited in the opening brief of appellant, wholly inadmissible.

And even if it did, the cases cited by counsel for

appellees, (Appellees Brief, pp. 4, 7), have no application to the present case at all. Appellant does not dispute the fact of the powers of the State of Montana to regulate the manner in which its stock can be levied upon and that in case of such levy, of how it shall be done, but appellant does not concede that the State of Montana has any power to direct a sister state how or in what manner that sister state shall levy execution and upon what property it can execute and therefore the citation referred to by counsel being applicable to domestic corporation would not apply to the instant case, and the same can be said of the other citation of authority for they deal with the question of attachment of the corporate stock of a corporation without having the certificate of stock and without obtaining jurisdiction over the corporation and there is no question that the situs of the stock of a corporation is at the domicile of the corporation for the purpose of enforcement of the liens of the corporation upon said stock and most states expressly provides in the statutes upon that subject that the stock is transferable by assignment subject to the liens of the said corporation thereon and so the *Jellenik vs. Huron Etc.*, 177 U. S. 1, does not apply here, nor the *Cotter vs. B. & R., etc.*, (Mont.), 77, Pac. 509, for these cases deal with the enforcement of the liens of a corporation in the former and the later the question of the issuing of the certificate originally, and since in the instant case there was no levy made on

the corporate stock, for the reason that the certificate of stock was within the State of Washington and held there by a resident owner and the said S. O. Leland being then resident also of the State of Washington and personal service was had upon him and the court thereby had jurisdiction over the person of the said S. O. Leland as well as the jurisdiction over the certificate itself by reason of the said levy made, and it was not necessary to comply with the laws of the State of Montana and thus the laws of the State of Montana on the subject has no application to the instant case in that regard, and this court held in a very recent case *Blake vs. Torman Bros. Banking Co.*, 218 Fed. 264, as follows:

“Certificates of stock in corporations, properly indorsed and delivered as security to a trustee with power of sale in case of default in the trust agreement, are property, having the situs at the place of business of the trustee.”

I nother words that the domicile of the owner of the certificates or trustee in charge thereof was the situs of the certificate. Counsels says that appellant cited no statute in the State of Washington authorizing the levy of execution upon shares of stock in a foreign corporation and appellant does not claim, that he has, but appellees concede that the levy was duly and regularly made only disputes the fact that the certificates do not constitute

personal property, and the appellant cites the law of the state of Washington in regard to the levy upon personal property found within its borders and appellees concede that, as they do not deny the same and therefore appellees cite the case of *Danils vs. Gold Hill M. Co.*, 68 Pac., 884, as authority for the fact that stock in a corporation cannot be seized on execution and sold unless authorized by express statute and this case is on all fours with the case of *Plimpton vs. Bigelow*, 93 N. Y., 592 and the same principal is laid down in each case and the court determine that the foreign stock of a corporation cannot be attached by execution when the certificates themselves are not within the borders of the State wherein the levy is sought to be made, and the Supreme Court of the State of New York in passing upon a case where the certificate itself was within the state of a foreign corporation in the case of *Simpson vs. Jersey City Contracting Co.*, 165 N. Y., 193, spoke as follows:

“It was said that a share of capital stock represents an undivided interest in the whole of the corporate property, and the certificates of stock evidence the number of shares owned by the stockholder; that the right of a stockholder to share in the corporate property is a chose in action, which follows the shareholder’s person; and that the property represented has its legal situs either at the domicil of the corporation or at that of the holder of the shares. It is difficult to see how that case, in defining the gen-

neral understanding of the law with respect to the ownership of shares of stock in a corporation can be said to be within the state for jurisdictional purposes through attachment proceedings, but whether the certificates of stock being here under a transfer by their owner to the trust company in pledge to secure an indebtedness of the former, there was not present property of the debtor which was capable of effectual seizure by the court's process.

But it is further argued in support of the proposition that the court was without jurisdiction that a judicial sale of the defendant's property or interests here would be ineffectual, because a transfer of the shares upon the corporate books could not be effectuated through any order of the court. The argument, again, rests upon *Plimpton vs. Bigelow*, where it was observed in the opinion that "it could scarcely be expected that the courts of another state would recognize a title to corporate stock in one of its own corporations, founded upon a sale under an attachment issued by our courts against a nonresident, when the only semblance of jurisdiction over the property was the service of notice in the attachment proceedings upon an officer or agent of the corporation here." The facts of that case, as I have already intimated, make it inapplicable here. It is an incorrect idea that the managing agents of the corporation or joint-stock company might have some discretionary authority to refuse a proposed transfer. Such a proposition is not sanctioned by the common law, and could not stand the test of reason. The presumption is that, if the stock of the defendant was sold at a judicial sale to another, the right of the purchaser to a transfer would be recognized, and his ownership of the stock be

given effect upon the books of the corporation. The managing agents of a corporation may prescribe reasonable rules and formalities regulating the transfer of shares, but they could have no discretionary power to refuse to register a proposed transfer. We are not to assume, in the event of a judicial sale of the defendant's interest in this stock for the purpose of applying upon the plaintiff's judgment any surplus remaining after satisfaction of the pledgee's demands, that it will be ineffectual to transfer to the purchaser a right to the ownership of the stock and to a transfer of the title upon the books of the corporation, as valid as though the trust company had sold it at a public sale, and delivered the certificates in its possession to a purchaser. The presumption with respect to the effect of a judicial sale of the stock is quite the other way from that which is suggested. It is not that our courts could effectuate a transfer of the stock upon the books of the foreign corporation, but that the corporation itself will recognize and give effect to the purchaser's title."

The Federal court said on this subject in the case of *Merritt vs. Steel Barge Co.*, 79 Fed., 288, 234-236, as follows:

"It is contended, however, that this rule has no application to the stock of a foreign corporation, that stock certificates are mere evidence of the ownership of stock, and that the stock of a corporation can have no situs outside of the state in which the corporation was created. Speaking, technically, it is true that stock certificates is written evidence of a certain interest in corporate property. The same may be said

of notes and bills. They are simply evidence of indebtedness on the part of the individuals or corporations who issue them. But in the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

"In view of the foregoing consideration we are of the opinion that stock certificates are personal property within the purview of the foregoing statute, and that when such certificates are held in pledge, or as collateral, within the state, the court of that state have jurisdiction to establish the existence of a lien thereon, and to enforce the same by directing a sale of the property."

The Court of Nebraska said on this subject as follows in the case of Puget Sound Nat. Bank vs. Mather, 62 N. W., 396:

"Certificates of stock in a foreign corporation are personal property, and, when in the hands of third parties within this state, are subject to garnishment."

Therefore the cases cited in the opening brief of appellant are very much in point and the courts of Washington have never passed upon a case like the instant case and therefore the Daniels vs. Gold Hill M. Co. is not in point here, counsel further remarks that all the cases cited by appellant are cases where

the certificates were pledged as security or collateral or held under agreement for a lien thereon, but this court will see at a glance that this is not true as in the cases cited in the attachment has been made by the third party.

I will go still further. The Statute of the State of Montana provides that the stock of a corporation can be transferred as follows:

“The delivery of a certificate of a corporation to a boni fida purchaser or pledgee for value together with a written transfer of the same or written power of attorney to sell, assign and transfer same signed by the owner of the certificate, shall be sufficient delivery to transfer the title as against the creditors of the transferrer and subsequent purchasers, but no such transfer shall effect the right of the corporation to pay any dividend due upon stock or to treat the holder as a holder in fact untill the same is transferred upon the books of the company or new certificate is issued to the person to whom it has been so transferred.” (Section 3855, Rev. Code of Montana).

And therefore under this section of the Statute of Montana certificates of stock by proper indorsement can be assigned and the title thereto pass without the sanction of the corporation except the statute provides that the company can protect itself against suit for dividends untill the stock is transferred on the books, but it does not give the corporation any lien upon said stock and makes a certificate of stock in a Montana corporation then negotiable

and as such is the same as a promissary note and property within the meaning of the laws of Montana and can be passed as such.

Princeton Min. Co. vs. First Nat. Bank, 19 Pac., 210. (Montana case).

Since then the Statute of Montana provides that the certificates of stock in its corporation are personal property and can be sold at private sale by the owner thereof without the consent or any act of the corporation itself, the said corporation could not pass a by-law which would be contrary to this statute and therefore if the stock of a corporation can be sold and delivered at private sale by the delivery and written transfer of the certificate itself, there is no reason in the argument of counsel for appellees to the effect, that the said certificate is nothing but the evidence of the stock and amounts to nothing, and also if the said certificate can be sold at private sale it does represent property and can be sold at public sale as well, as long as the certificate is in the hands of the party authorized to make said public sale as cited by appellant in opening brief and especially is this true of a certificate in a Montana corporation as in the instant case, the certificate in question herein was properly indorsed to E. C. Murphy by S. O. Leland and properly transferred according to the Statute of Montana on the 6th day of March, 1912, when the sale of the same

occured and therefore the said S. O. Leland cannot claim any right, title or interest therein and if he cannot, the corporation clearly has no claim by statute or otherwise to reject the transfer of the said certificate to the appellant herein and in view of the attitude of the said appellees it seems that the appellant should be entitled to a money judgment in this case for the reason that the said corporation's action throughout this cause coupled with the testimony of the fact that they have not kept any books or made any record of the expense of running the business since the said certificate of stock was transferred to E. C. Murphy, (Trans., p. 72), that it is their intention to defeat the appellant and there never could be harmony to be associated with such persons, no doubt it will take a great deal of litigation yet to force the said corporation to account for the assets of the said corporation which have been wrongfully disposed of in order to defeat the appellants claims herein.

I respectfully submit that the judgment of the lower court should be reversed and the appellant be given the relief prayed for.

WALTER B. MITCHELL,
Attorney for Appellant in pro. per.

United States ⁹
Circuit Court of Appeals
For the Ninth Circuit

WALTER B. MITCHELL,

Appellant,

vs.

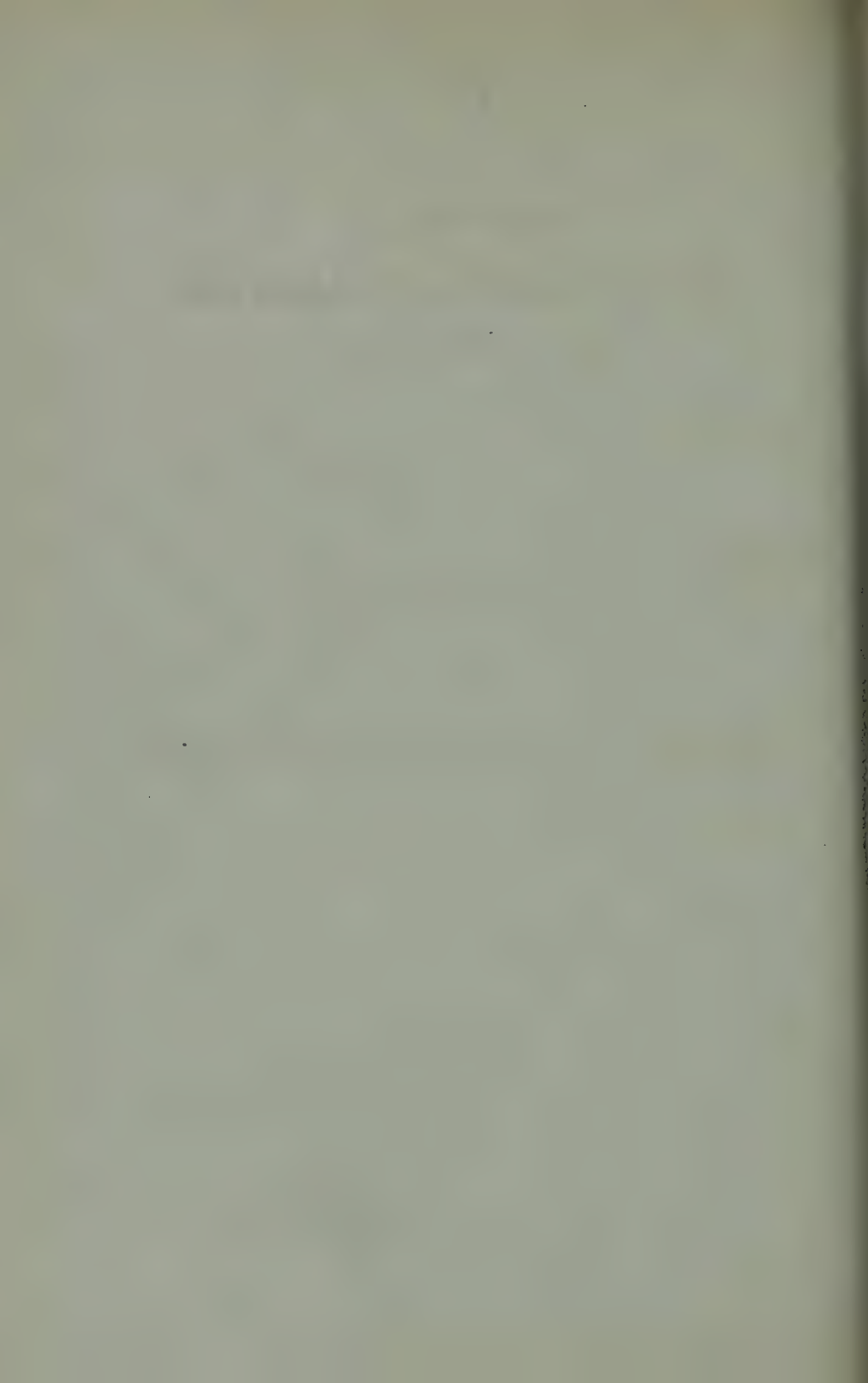
THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND,
Appellees.

Petition of Appellant for Rehearing

Upon Appeal from the United States District Court
for the District of Montana.

WALTER B. MITCHELL,
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United States
Circuit Court of Appeals
For the Ninth Circuit

WALTER B. MITCHELL,

Appellant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND,
Appellees.

Petition of Appellant for Rehearing

Upon Appeal from the United States District Court
for the District of Montana.

Comes now the above mentioned plaintiff in error and petitions this honorable court for a rehearing of the above-entitled cause in this court. Said petition is based upon the record and files in this cause and the argument of plaintiff in error heretofore and herein presented.

W. B. MITCHELL,

Attorney for Plaintiff in Error.

ARGUMENT.

I approach the subject of this petition with a great deal of hesitancy, knowing as I do, the disinclination of the courts to grant petitions for rehearing of causes after arguments have once been fully presented, and I would not present this petition, did I not believe that it had exceptional merit and I was not fully convinced that the court has inadvertently committed a grave error in affirming the judgment of the lower court.

In this petition I will not discuss whether a certificate of stock in a foreign corporation is personal property and subject to levy of execution and sale under the laws of the State of Washington, but will take the opinion of this court, to-wit:

“We incline to the view that corporate stock is personal property within the intendment of the Washington Statutes on execution and attachment, and is subject to levy and sale, if regularly and properly made and executed. This means that the certificate of stock must be physically within the state, and the levy and sale made in pursuance of the provisions of the local statutes.”

“When the writ of execution is against the property of the judgment debtor, it shall be executed by the sheriff as follows:

4. Property shall be levied on in like manner and with like effect as similar property is attached.”

Rem. & Bal., Code of Wash., Sec. 578, Sub. 4.

“The sheriff to whom the writ is directed and delivered must execute the same without delay, as follows:

2. Personal property capable of manual delivery shall be attached by taking into custody.”

Rem. & Bal., Code of Wash., Sec. 659, Sub. 2:

“The sheriff must return the writ of attachment with the summons, if issued at the same time, otherwise, within twenty days after receipt, with a certificate of his proceedings indorsed thereon or attached thereto. Etc.”

Rem. & Bal., Code of Wash., Sec. 676.

“All sales of property under execution,***, shall be made by auction between nine o'clock in the morning and four o'clock in the afternoon. * * * When the sale is of personal property capable of manual delivery, and not in possession of a third person***, it shall be within view of those who attend the sale, ***.”

Rem. & Bal., Code of Wash., Sec. 583.

“When the purchaser of any personal property capable of manual delivery, and not in the possession of a third person,**, shall pay the purchase money, the sheriff shall deliver to him the property, and if desired, shall give him a bill of sale containing an acknowledgement of the payment.***”

Rem. & Bal., Code of Wash., Sec. 586.

The Washington Court of record issued an execution commanding the sheriff as follows:

“Therefore, in the name of the State of Washington, you are hereby commanded to levy upon, seize into execution the personal property of the said S O. Leland and Amelia Leland, his wife, in your county, ***, and make return of this writ within sixty days from the date hereof.” (See Transcript of record herein, page 50).

“I, Geo. E. Stone, Sheriff of Spokane County, State of Washington, do hereby certify that the annexed execution came into my hands on the 1st day of May, A. D. 1913, and by virtue of the same I did, on the 1st day of May, A. D. 1913, levy upon the personal property hereinafter described as follows, to-wit: Certificate No. 1, for fifty (50) shares of the capital stock of the Leland Company, a corporation, of the State of Montana, and that I duly noticed said property, according to law, to be sold by me, at the east door, of the court house, in the City of Spokane, in said County and State, on the 12th day of May, A. D. 1913, at Ten o'clock in the forenoon of said day.***** I attended at the time and place fixed for said sale, and **exposed the said property for sale by offering it at public auction, according to law, to the highest bidder, for cash in hand,******* and I have given said purchaser a certificate of sale.” (See Transcript of record herein, pp. 45-46).

“It is not the rule that a sale of real property is void merely because the sheriff failed to return that he had been unable to find sufficient personalty to satisfy the writ before levying upon the real estate of the judgement debtor, even when the statute expressly provides, which ours does not, that the sheriff shall first levy upon the debtor's personal property. In a collateral action to set

aside the sale, it will be presumed that the officer performed his duty in this respect."

Withworth vs. McKee, 32 Wash., 83 (93), 72 Pac., 1046.

"A return that a sheriff had, "Levied" the writ on certain personal property was sufficient."

Baldwin vs. Conger, 17 Miss., p. 516.

"This court, speaking through Hon. William W. Morrow, Circuit Judge, said: "It is a general principle to presume that public officers act correctly, in accordance with the law and their instructions, until the contrary appears. Ross vs. Reed, 1 Wheat, 482, 484, 4 L. Ed., 141; Gonzales vs. Ross, 120, U. S., 605, 622, 7 Supt. Ct., 705, 30 L. Ed. 801. In the present case there is nothing stated in return, nor is there any fact before the court, tending to show that the marshall failed in any particular to do his duty in serving the attachment, or that his official acts were in any respect irregular. The presumption therefore arises that the writ of attachment was served in accordance with the requirements of the statute, and that writ was valid.

Griffin vs. American Gold Min. Co., 136, Fed., Fed., 69, at 73.

In the opinion rendered by this court herein it recites:

"The return declares that he levied upon it. But this is only a conclusion. It should have stated the manner of levy. Mitchell says that the certificate was delivered to him at the sale, as he bid it

in for Coolin. As to whether it was delivered to him by the sheriff there is only a bare inference."

But under the above return of the sheriff, he positively says that he levied upon the personal property to-wit: the certificate in question herein and that he exposed the said property for sale by offering it at public auction, according to law, that is he had said certificate of stock in question in his hands and was within view of the bidders at said sale and he delivered it to Mitchell, and therefore under the facts and the law as cited on this point the said levy and sale was regular in every way and therefore the title to said certificate passed to Coolin by virtue of said sale and to the plaintiff herein by virtue of assignment of same from Coolin, for since the said judgment roll of the Superior Court of the State of Washington was introduced in evidence without objection on the part of the defendant and no evidence was introduced by said defendant to contradict the fact recited in the sheriff's return, or to the testimony of Mitchell that he received the certificate at the sale, then the law presumes that everything was regular and that it was the sheriff that gave the certificate to Mitchell for Coolin, when the certificate of sale was given him.

In the opinion of this court it says:

"It is unnecessary to pursue the discussion further. It is manifest, along with the manifold irregularities attending the pretended levy and sale, that the procedure adopted was devised for divesting Leland of the title to his stock, after

Murphy had, by violence and trespass and without right, snatched the possession of it from him, and must be considered and held to be a part of a concerted attempt to despoil Leland of property rightfully his. Parties must not expect relief in equity unless they come into court with clean hands." (Page 7.)

This court in rendering the above part of its opinion, has inadvertently overlooked the fact that there was no evidence introduced in the instant case to contradict the return of the sheriff on the sale of the certificate in question herein, and therefore has misapplied the law as shown heretofore, to-wit: That in such cases the law presumes that the sheriff acted in accordance with the law and his instructions, and has further inadvertently overlooked the return itself as shown on pages 45-46 of transcript, where the sheriff says that he exposed said certificate and offered it for sale etc. Therefore this court is in error when it says there was manifold irregularities attending said sale and levy, for as a matter of fact there is none. The court had further inadvertently overlooked the fact that the plaintiff has raised a constitutional question in the instant case, to-wit:

"The Court erred in not giving full faith and credit to the proceedings in Spokane, Wash., being the records of a court of record of the State of Washington, in violation of the constitution of the United States, Article 4, Sec. 1." (See Transcript herein, page 69.)

S. O. Leland entered into a contract with E. C. Murphy on the blank date of May, 1912, for the return of the certificate in question herein, (see Transcript of

record herein page 53) and this contract was assigned to John E. Murphy by E. C. Murphy on the 20th day of June 1913, (see Transcript of record herein, p. 39), said John E. Murphy brought suit upon this contract on the 8th day of March, 1913, and in the complaint said John E. Murphy alleged as follows:

“That the above contract was duly assigned to the plaintiff on the 20th day of June, 1912, and that the contract was carried out except the payment of \$100.00, which payment is long past due and the defendants has persistently refused to pay said amount as agreed or at all.” (See Transcript of record herein, p. 39.)

The said Lelands never denied this allegation but allowed this action to go by default and said default was entered against them on the 8th day of April, 1913, and judgment also on same day, (see Transcript of record herein, pp. 43-44), and therefore under and by virtue of this judgment of a court of record of the State of Washington it is determined that said S. O. Leland never paid this money and refused to pay the money upon the frequent demands of said John E. Murphy and this judgment is a final adjudication of the said question. Said judgment not having been reversed by the courts of Washington and the time in which said appeal could be taken having elapsed.

“The whole theory of the doctrine of *res judicata* is that a question once decided by a court of competent jurisdiction having jurisdiction of the parties is finally decided, until reversed upon appeal

or otherwise set aside in some lawful way. (Citing cases): *Harding vs. Harding*, 198 U. S. 317.

“It is the settled law in this state in an action between the same parties a judgment therein is *res judicata* as to all points in issue and also as to all points that might have been raised and adjudicated in such action.”

Loeper vs. Loeper, 81 Wash., 454. 142, Pac. 1138.

Hawkins vs. Reber, 81 Wash., 82. 142 Pac. 432.

“No appeal of any kind having been taken from the first judgment or from the order refusing to vacate it, that judgment is *res judicata* as to the whole controversy touching the large car.”

Winton Motor Car Co. vs. Blomberg, 84 Wash., 451. 147 Pac. 21.

“Judgment in an action of replevin, by a court of a sister state having jurisdiction of the subject matter and of the person of the only defendant named as vendee in a bill of sale of the property, which determines the title to the property to be in plaintiff, cannot be collaterally attacked by one claiming to have an interest with defendant as one of the vendees, even though the judgment be erroneous.”

Fleming vs. Langley, 86 Wash., 346. 150 Pac. 418.

“The courts of one State must give full faith and credit to a judgment rendered by the courts of another state.”

Free vs. Western Union Tel. Co., 147 N. W. 1040:

“As the judgment here relied upon was not a transaction based on any acts mentioned in section 993 of the New York Code, which is the only statute in that state which effects the validity of the judgments based upon gambling transactions it is not void, under the laws of that state, and being entitled under the constitution of the United States to the same faith and credit it would receive in the courts of the State of New York and is not subject to attack in this proceedings.”

Carpenter vs Beal Etc., 222 Fed., 453-461.

Roller vs. Murry, 234 U. S., 738.

S. O Leland was allowed to testify over the objection of the plaintiff as to what occurred between him and E. C. Murphy in reference to the return of the certificate etc. (See Transcript of record herein, p. 76):

“That he completed his contract with Murphy, deeded certain realty to Murphy and delivered Murphy a check for \$100.00; Thereupon Murphy delivered the share certificate in question to him without any written assignment; immediately, however, Murphy demanded other money from me and upon my refusing to pay, Murphy wrested the share certificate from my hands, and thereafter on my repeated demand for it, he assured me that it was lost.” ((See Transcript of record herein, p. 77).

But further on cross examination S. O. Leland said:

“He was personally served with process in the City of Spokane, Wash., and that he was then a resident of Spokane, Wash., and allowed the said suit to go by default and made no attempt to

fight it at all; and before judgment was rendered Walter B. Mitchell, plaintiff herein, tendered the certificate in question to him and demanded the money called for in said contract and he refused to pay it then; and later, about the middle of May, he moved to California and has resided there since." (See Transcript of record herein, p. 77).

W. B. Mitchell testified as follows:

"That the date of the tender of said certificate to S. O. Leland and demand for the payment was prior to taking default in said proceedings, which according to the record of the cause was on the 8th day of April, 1913, and that at that time S. O. Leland made no claim of ever offering Murphy a check, and he refusing it or mentioned anything that would create a suspicion of anything of that nature." (See Transcript of record herein, pp. 77-78).

It will be well then to observe the testimony of S. O. Leland, and first we find that he does not give any date for this purported conversation and doings of E. C. Murphy and as a matter of fact if it did occur after the assignment it was not admissable against John E. Murphy or A. Coolin or plaintiff herein, and if it occurred before the assignment then it was a matter that should have been defended in the suit in the Washington courts for the court found there that S. O. Leland failed and refused to pay this money and by reason of that failure gave judgment against him on or about the 8th of April, 1913, and up to February 1st 1916, the day of the trial of this suit in Helena, this man, S. O. Leland, never took any steps to set aside this judgment in any way manner or form, but stood by and allowed the court to ren-

der judgment against him and the sheriff to sell the certificate to satisfy the judgment and three days after the sale he left Spokane, Washington, and went to California, (see Transcript of record herein, p. 77) and has never since tried to have said judgment or sale reversed or set aside in the courts of Washington. He attempts to say to this court in one breath that E. C. Murphy assured him the stock was lost, but on cross examination the next breath of this man was that the stock certificate was tendered to him by Mitchell, who was attorney for John E. Murphy on the 8th day of April, 1913, and the money demanded and that he refused to pay the same and take the certificate, and by this admission it is found that this man, S. O. Leland, knew this certificate was not lost and the fact that he did not deny the allegation of John E. Murphy, to-wit: that S. O. Leland had persistently refused to pay this money as agreed or at all, would be conclusive of the fact that S. O. Leland knew from the 20th of June, 1912, that John E. Murphy had said stock certificate and the same was not lost, and since the date of the contract between S. O. Leland and E. C. Murphy was blank, there is no evidence introduced in the instant case to show the exact date of same and it was the duty of S. O. Leland to at least inform the said John E. Murphy of any defenses that he had to the payment of said money and also his duty to appear and set forth his defenses if he had any to the suit in the Washington courts and his failure to do so was fatal to his contention now that he

had a defenses of any kind or nature and the courts of Washington could not entertain any such claim at this time.

On the other hand the fact that S. O. Leland attempted to get a new certificate issued by the Leland Company on the 1st day of May, 1913, (see Transcript of record herein, p. 17) at a time when both he and the said corporation knew that said certificate of stock was not lost, (see Transcript of record herein, p. 28) and that Theodore Leland received the letter of May 29, 1913, (see Transcript of record herein, pp. 24, 25, 26 and 27) and that Theodore Leland informed Mitchell's agent at Gardner that there was a new certificate issued to S. O. Leland on the theory that S. O. Leland made an affidavit that the old one was lost, (see Transcript of record herein, pp. 34-35), shows that S. O. Leland made a false affidavit, as he knew at the time that it was not lost and that the corporation was lending its aid to try and defeat the said John E. Murphy out of the payment of the judgment by converting the old certificate and if there was any fraud practice in this transaction from start to finish, it was the fraud of S. O. Leland, and it does not seem possible that this court will allow S. O. Leland to come into court of equity and testify falsely, as shown herein to matters which are not even admissible in evidence in the instant case and then assume fraud upon the part of the plaintiff herein by reason of that false testimony

"It is elementary that one asserting fraud as a ground of action must, in order to maintain the action, prove the fraud by clear and convincing evidence."

Ulbright vs. Mulcahy, 78 Wash., 9, 138 Pac., 314.

And there is no case that I have been able to find where the court is held to have the right to assume fraud unless so shown by the testimony. On the other hand in the answer of the appellee to the amended complaint herein, (see Transcript of record herein, p. 17), it was the contention of this defendant that there was a new certificate issued in place of the one in question herein, as shown on page 29 of Transcript herein, on or about May 1st, 1913, after it had notice as shown on page 28 of Transcript herein that the old certificate was in the hands of others than S. O. Leland and in the face of the clause in said certificate that same had to be surrendered before a new one was issued and that defense was abandoned for the reason that there was no such transaction and no new certificate ever issued and therefore this defense was a false defense and naturally this circumstance shows that the defendant did not come into court with clean hands from the start and if it would try one false move, then the attempt to obtain the same result by placing S. O. Leland on the stand to testify as he did can be construed in no other light than another attempt to cast some suspicion on the plaintiff of fraud and should not be tolerated by a court of equity.

S. O. Leland did not even leave this affidavit with said corporation but kept the same in his own possession in order that it could not be produced against him in case of his apprehension for making false affidavits to obstruct due administration of the laws of the State of Washington, and even left Washington and went to California.

“According to their books new stock was issued in place of this certificate for the reason that same was lost or destroyed and affidavit to that effect is in possession of S. O. Leland, who is now in San Francisco, Calif.” (Trans. p. 35).

In making this affidavit S O Leland was not truthfully reciting what he believed the facts to be, but on the contrary was citing that the certificate was lost or destroyed on May 1st, 1913, when he knew, and was forced to admit upon cross examination herein that said certificate was in the hands of John E Murphy and was not lost.

Any testimony of S. O. Leland then must be carefully examined as he is shown to be deliberately trying to avoid the payment of his just obligations by fraudulent means. Now, then, he says “Murphy delivered the share certificate to him without any written transfer thereof, and he delivered to Murphy a check for \$100.00. Immediately, however, Murphy demanded other money from me, and upon my refusal to pay, Murphy wrested the share certificate from my hands.” Suppose then, that Murphy when he inspected the check refused to ac-

cept the same, but demanded money in place of same, or in other words other money in place of the check and Leland refused to give money and Murphy refused to transfer the certificate and took the certificate back, then Murphy was perfectly justified in taking the certificate back under the circumstances, **if it did occur.**

A similar state of facts was presented to the Supreme Court of Idaho, to-wit:

One Fales entered into a contract for the conveyance of certain lots upon the payment of certain money, and then contracted with the Weeter Lumber Co. to furnish building material and upon the failure of Fales to pay said account the Lumber Co brought suit and recovered judgment and foreclosed its lien against the property. Thereafter Fales and wife brought suit in equity to set aside the judgment on the grounds that Elizabeth Fales was not a party to the first action and that it was community property and therefore the trial court of the first action acquired no jurisdiction. It was held in that case that Elizabeth Fales being present at the trial and testifying for her husband and knowing that the lien was filed and was being foreclosed and not making any objection then, that she could not now make objection and said suit in equity was dismissed.

Fales vs. Weeter Lumber Co., Ltd., 26 Idaho,
367, 143 Pac., 526

In the instant case S. O. Leland did not make any defense to the suit in Washington, and it is clear to be seen that if he was to have tried to set aside the judgment in Washington, that he would have failed and

therefore under the full faith and credit due the Washington Court of records, his testimony was clearly inadmissible herein and cannot be made the foundation of setting aside the Washington judgment and proceedings in a collateral attack and the introduction of said evidence was an error of the trial court and the consideration of same by this court was an error of this court. As the Washington judgment cannot be attacked in this court and any relief obtained in the U. S. Circuit Court of Montana, as the place to attack a judgment or sale is in the court wherein the same is tried and unless done there it is conclusive of the matters therein determined.

The record in the instant case shows that S. O. Leland has persistently tried to avoid the payment of the obligations of the contract with E. C. Murphy and which was assigned to John E. Murphy and it further shows that said John E. Murphy has acted in good faith at all times and has given the said S. O. Leland every opportunity that is required as a matter of law and has even went further and gave said S. O. Leland timely notice of the dangers that he was in providing that said payments were not made and said S. O. Leland has ignored said warning and even defied the courts of the State of Washington and is now attempting to use this court to avoid his just debts under the color of fraud which he claims that was practiced upon him, not by the plaintiff or John E. Murphy, but by E. C. Murphy after he has stood by and saw E. C. Murphy assign said

contract and suit brought to enforce the same and sheriff sell said certificate to satisfy the judgment without giving notice of his claim, and does not attempt to offer the payment of his just obligation and he certainly is not in a court of equity and the corporation has no claim to equity in this proceedings. If the rule that one must come into court of equity with clean hands applies to this case at all, this court has inadvertently applied it to the wrong party for it must apply if at all to the appellee herein.

I desire to say in conclusion that I know petitions for rehearing are not favored, but I realize, and I can say freely that this Court in rendering its opinion in this case must have overlooked the matter presented in this petition inadvertently and does not wish to intentionally create a hardship upon any litigant to force him to seek a correction of this matter in the higher Court, if such inadvertence can be plainly pointed out to it, as I believe has been in this argument, and I earnestly urge in the interest of justice to both plaintiff and defendant that this petition for rehearing be granted and rearguments be had and reconsideration of the questions suggested in this petition.

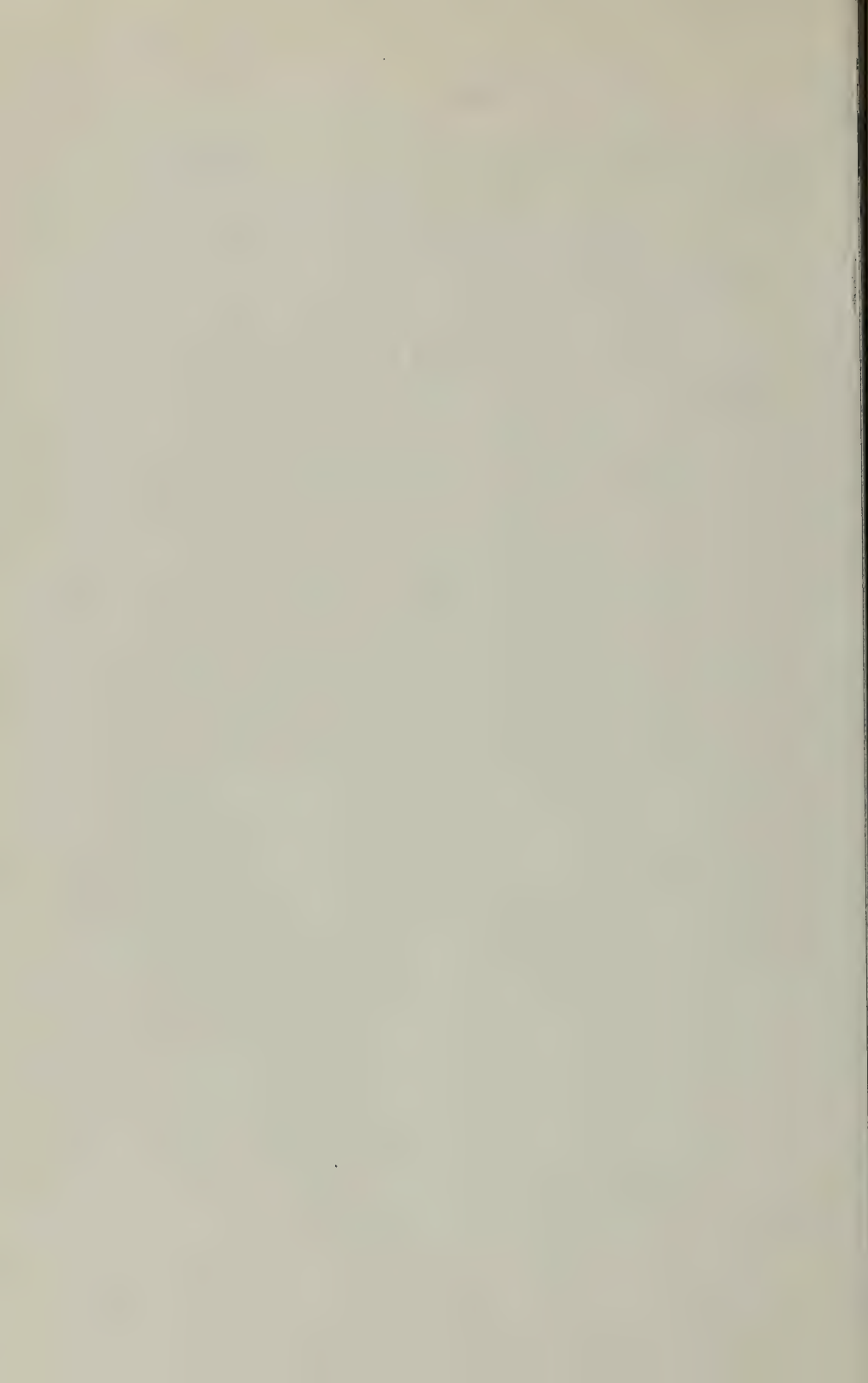
Respectfully submitted,

W. B. MITCHELL,

Attorney for Plaintiff in Error.

The undersigned, attorney for Plaintiff in Error, hereby certifies that in his opinion and judgment the foregoing petition for rehearing is well founded in law, and allege that it is not interposed for delay.

W. B. MITCHELL,
Attorney for Plaintiff in Error.



UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

10

UNITED STATES STEEL PRODUCTS COMPANY,
a corporation,

Plaintiff in Error,

v.s.

POOLE-DEAN COMPANY, a corporation,

Defendant in Error.

TRANSCRIPT OF RECORD ON WRIT OF ERROR

To the District Court of the United States for the District of Oregon

Filed

FEB 9 - 1917

F. D. Monckton,

Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES STEEL PRODUCTS COMPANY,
a corporation,
Plaintiff in Error,

vs.

POOLE-DEAN COMPANY, a corporation,
Defendant in Error.

TRANSCRIPT OF RECORD ON WRIT OF ERROR

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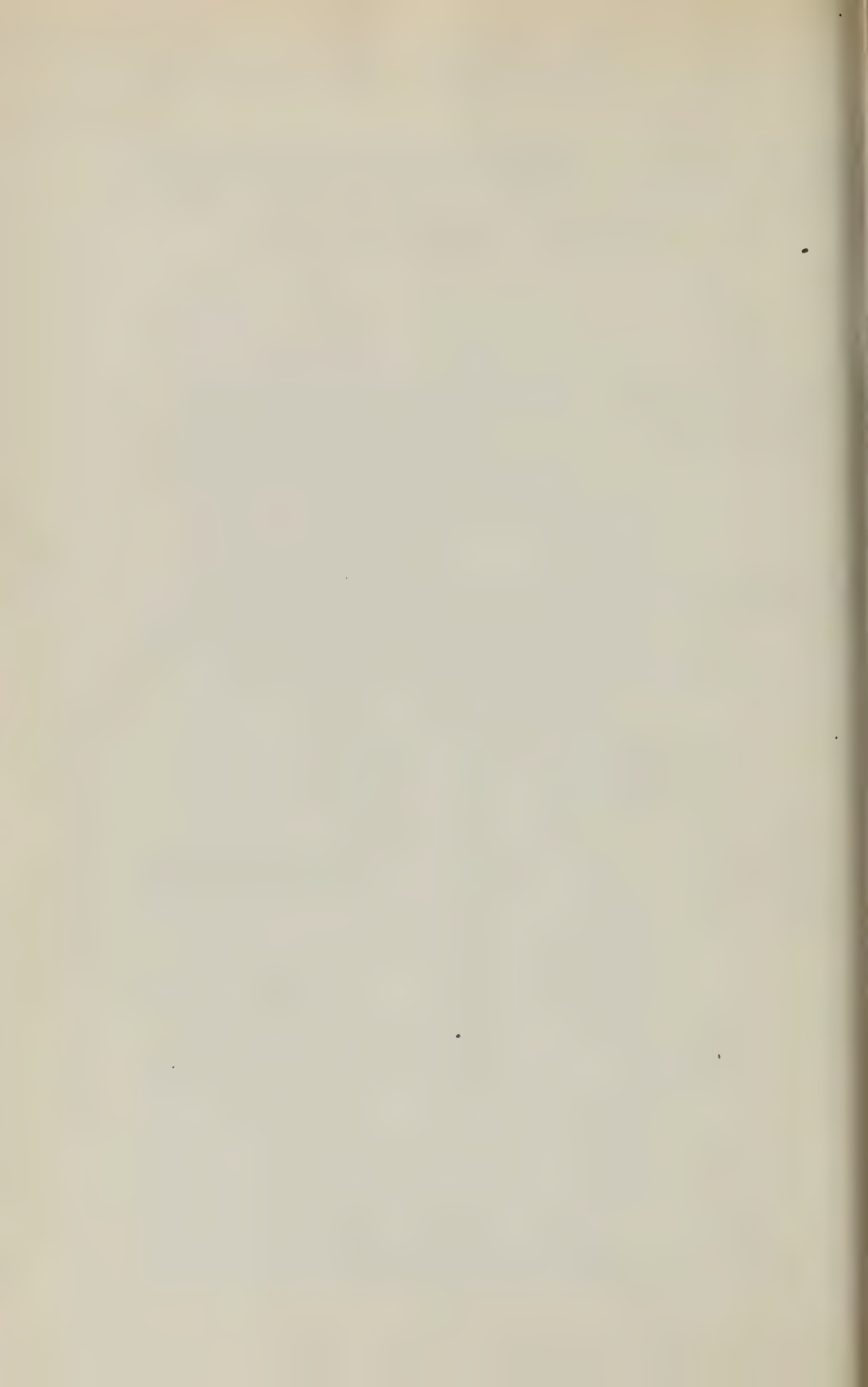
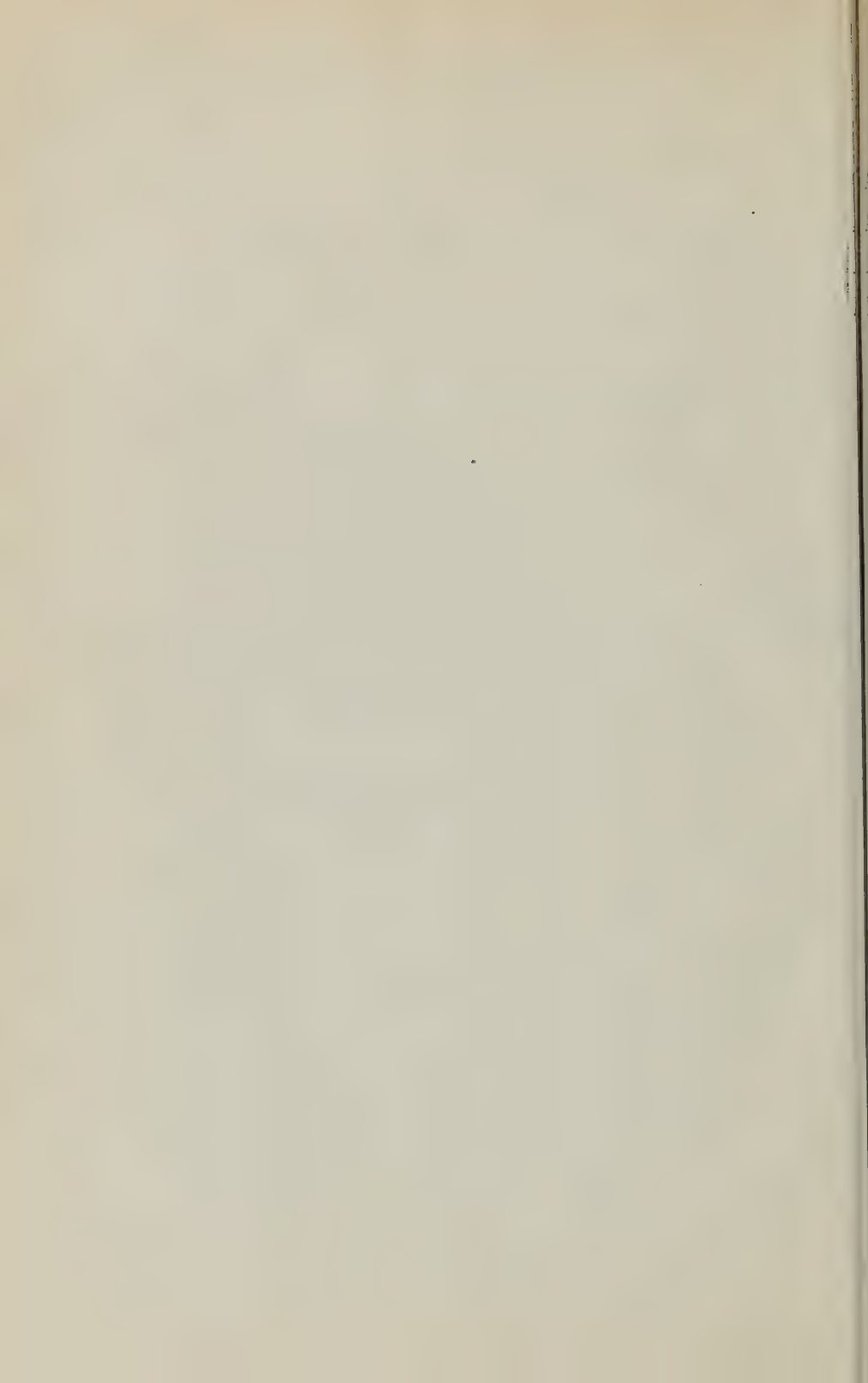


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*United States Circuit Court of Appeals for the
Ninth Circuit.*

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,

Plaintiff in Error,

vs.

POOLE-DEAN COMPANY, a corporation,

Defendant in Error.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

TEAL, MINOR & WINFREE and
ROGERS MAC VEAGH,
Spalding Building, Portland, Oregon,
For the Plaintiff in Error.

McDOUGAL & McDOUGAL,
Northwestern Bank Building, Portland, Oregon,
For the Defendant in Error.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,

Plaintiff in Error,

vs.

POOLE-DEAN COMPANY, a corporation,

Defendant in Error.

Citation on Writ of Error

UNITED STATES OF AMERICA,
District of Oregon,—ss.

To Poole-Dean Company, a corporation,
Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein United States Steel Products Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, of any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said Dis-

(Citation on Writ of Error.)

trict, this 3rd day of January, in the year of our
Lord, one thousand, nine hundred and seventeen.

CHAS. E. WOLVERTON,

Judge.

Filed January 3, 1917. G. H. Marsh, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,

Plaintiff in Error,

vs.

POOLE-DEAN COMPANY, a corporation,

Defendant in Error.

Writ of Error

THE UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF
AMERICA.

To the Judge of the District Court of the United
States for the District of Oregon—Greeting:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before the Honorable Charles
E. Wolverton, one of you, between Poole-Dean Com-
pany, a corporation, plaintiff and defendant in error,
and United States Steel Products Company, a cor-
poration, defendant and plaintiff in error, a mani-
fest error hath happened to the great damage of the
said plaintiff in error, as by complaint doth appear;
and we, being willing that error, if any hath been,
should be duly corrected, and full and speedy justice
done to the parties aforesaid, and, in this behalf, do
command you, if judgment be therein given, that

(Writ of Error.)

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White,
Chief Justice of the Supreme Court of the United
States, this 3rd day of January, 1917.

(Seal)

G. H. MARSH,

Clerk of the District Court of the United
States for the District of Oregon.

Filed January 3, 1917. G. H. Marsh, Clerk.

Service of the foregoing Writ of Error made this 3rd day of January, 1917, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court, a duly certified copy of said Writ of Error.

G. H. MARSH,

Clerk, United States District Court,
District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

March Term, 1916.

Be it Remembered, That on the 19th day of September, 1916, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Complaint, which had been duly served upon the defendant named therein, now the plaintiff in error, on the 22nd day of April, 1916, but not filed until the said 19th day of September, 1916, in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,

Defendant.

Amended Complaint

Plaintiff complains and for cause of action alleges:

I.

That it is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business at Portland, Multnomah County, Oregon,

(Amended Complaint.)

and that at the times hereinafter mentioned it was a corporation duly authorized to transact business in the Province of British Columbia, Canada, with its principal place of business at Prince Rupert, British Columbia, all in accordance with the Foreign Companies Act of the Dominion of Canada.

II.

That the defendant is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey, and duly authorized to transact business as a foreign corporation within the State of Oregon.

III.

That on or about September, 1912, plaintiff entered into a contract with the defendant to furnish the labor and equipment to erect, rivet and paint the structural steel to be used in the machine shop, boiler shop, power house and other buildings of the Grand Trunk Pacific Company, at Prince Rupert, British Columbia, at an agreed price of \$18.00 per ton of 2000 pounds, said agreement providing that the steel should be fabricated at the factory and delivered to the plaintiff for erection upon the premises of the Grand Trunk Pacific Company at Prince Rupert, British Columbia, where said erection was to be performed.

IV.

That at the time said contract was entered into

(Amended Complaint.)

the agreed price of \$18.00 per ton of 2000 pounds was based upon the understanding that the steel for said terminal buildings would be delivered completely fabricated and that if extra work was necessary, other than for the erection of said steel, plaintiff would be allowed a reasonable amount for such extra work.

V.

That thereafter, when the erecting plans were received plaintiff and defendant discovered that the steel shipped from said plants would not be received at Prince Rupert completely fabricated as previously understood by plaintiff and defendant and plaintiff thereupon notified defendant that plaintiff would charge defendant for the extra work required in fabricating said steel and defendant, through its agent, Overmeier, promised, and agreed that said matter would be satisfactorily adjusted between plaintiff and defendant and instructed plaintiff to proceed with the work of said buildings.

VI.

That thereupon and pursuant to said agreement between plaintiff and defendant, plaintiff fabricated and assembled the steel for the cold storage building, at an actual and reasonable expense of \$166.95; for the ship shed at the actual and reasonable expense of \$1896.16; for the blacksmith, machine and boiler shop, at the actual and reasonable expense of \$479.00; for the power house at the actual and rea-

(Amended Complaint.)

sonable expense of \$207.39; for the foundry building the actual and reasonable expense of \$481.14, making a total actual and reasonable expense of \$3330.69.

VII.

That plaintiff has demanded that defendant pay said \$3330.69 which is long past due but the defendant has refused and now refuses to pay the same, or any part thereof.

And plaintiff, for a second cause of action, alleges:

I.

That plaintiff is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business at Portland, Multnomah County, Oregon, and that at the times hereinafter mentioned it was a corporation duly authorized to transact business in the Province of British Columbia, Canada, with its principal place of business at Prince Rupert, British Columbia, all in accordance with the Foreign Companies Act of the Dominion of Canada.

II.

That the defendant is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey, and duly authorized to transact business as a foreign corporation within the State of Oregon.

(Amended Complaint.)

III.

That heretofore and on or about September, 1912, plaintiff and defendant entered into a contract to furnish all necessary material and equipment to erect the structural steel to be used in the dry docks being constructed by the Grand Trunk Pacific Company at Prince Rupert, British Columbia, for the sum of \$18.00 per ton of 2000 pounds, the erecting to begin when three pontoons had been floated in said dry docks and that at the time such contract was entered into plaintiff and defendant went over the ground and it was understood and agreed that defendant would not order plaintiff to begin work on the job until such time as plaintiff could, when starting the building, for said Grand Trunk Pacific Company, continuously keep at the work until the completion of the job and that in the event that there were any delays to plaintiff in said work that the defendant would reimburse plaintiff for such delays and it was further understood and agreed that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Company; that plaintiff was thereafter instructed by defendant to commence work and plaintiff did commence work upon the buildings and completed the same before three pontoons of the dry docks had been floated and because of the premature instructions of the defendant and

(Amended Complaint.)

the delays in the completing of said pontoons, plaintiff's equipment was compelled to lie idle and remain in disuse for a period of time extending from September 1st, 1914 to November 5th, 1914, and that the reasonable rental of said equipment for said period of time was \$2123.64.

IV.

That plaintiff, on account of the premature instructions of defendant to begin work before the completion of said pontoons, as above set forth, has been damaged in the sum of \$2123.64 which sum is owing plaintiff, is long past due and which sum plaintiff has demanded of defendant and defendant has refused and continues in its refusal to make said payment.

And plaintiff, for a third cause of action, alleges:

I.

That plaintiff is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in Portland, Multnomah County, Oregon, and that at the times hereinafter mentioned it was a corporation duly authorized to transact business in the Province of British Columbia, Canada, with its principal place of business at Prince Rupert, British Columbia, all in accordance with the Foreign Companies Act of the Dominion of Canada.

(Amended Complaint.)

II.

That the defendant is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey, and duly authorized to transact business as a foreign corporation within the State of Oregon.

III.

That heretofore and on or about September, 1912, plaintiff and defendant entered into a contract to furnish all necessary material and equipment to erect the structural steel to be used in the dry docks being constructed by the Grand Trunk Pacific Company at Prince Rupert, British Columbia, for the sum of \$18.00 per ton of 2000 pounds, the erecting to begin when three pontoons had been floated in said dry docks and that at the time such contract was entered into plaintiff and defendant went over the ground and it was understood and agreed that defendant would not order plaintiff to begin work on the job until such time as plaintiff could, when starting the building, for said Grand Trunk Pacific Company, continuously keep at the work until the completion of the job and that in the event that there were any delays to plaintiff in said work that the defendant would reimburse plaintiff for such delays and it was further understood and agreed that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the struc-

(Amended Complaint.)

tural steel when it was unloaded on the dock of the Grand Trunk Pacific Company; that plaintiff was thereafter instructed by defendant to commence work and plaintiff did commence work upon the buildings and completed the same before three pontoons of the dry docks had been floated and because of the premature instructions of the defendant and the delays in the completing of said pontoons, plaintiff's equipment was compelled to lie idle and remain in disuse for a period of time extending from September 1st, 1914, to November 5th, 1914, making it necessary for plaintiff to return the laborers who were employed upon the work at Prince Rupert, British Columbia, to Vancouver, British Columbia, and pay the railroad expenses and wages of said men while in transit to Vancouver, British Columbia, at a cost of \$918.00.

IV.

That plaintiff, on account of the premature instructions to begin work, as above stated, has been damaged in the sum of \$918.00 which sum is now owing plaintiff and long past due and for which amount plaintiff has demanded payment and defendant has refused and now refuses payment of the same.

And plaintiff, for a fourth cause of action, alleges:

(Amended Complaint.)

I.

That plaintiff is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business at Portland, Multnomah County, Oregon, and that at the time hereinafter mentioned it was a corporation duly authorized to transact business in the Province of British Columbia, Canada, with its principal place of business at Prince Rupert, British Columbia, all in accordance with the Foreign Companies Act of the Dominion of Canada.

II.

That the defendant is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey, and duly authorized to transact business as a foreign corporation within the State of Oregon.

III.

That heretofore and on or about September, 1912, plaintiff and defendant entered into a contract to furnish all necessary material and equipment to erect the structural steel to be used in the dry docks being constructed by the Grand Trunk Pacific Company at Prince Rupert, British Columbia, for the sum of \$18.00 per ton of 2000 pounds, the erecting to begin when three pontoons had been floated in said dry docks and that at the time such contract was

(Amended Complaint.)

entered into plaintiff and defendant went over the ground and it was understood and agreed that defendant would not order plaintiff to begin work on the job until such time as plaintiff could, when starting the building for said Grand Trunk Pacific Company, continuously keep at the work until the completion of the job and that in the event that there were any delays to plaintiff in said work the defendant would reimburse plaintiff for such delays and it was further understood and agreed that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Company.

IV.

That defendant disregarded said understanding and agreement in that it failed to provide adequate space for assorting and handling said structural steel, necessitating this plaintiff's using extra time and labor in assorting and handling said steel, the reasonable value of said extra time and labor being \$2459.00.

V.

That plaintiff, on account of the failure of defendant, as above stated, has been damaged in the sum of \$2459.00, which sum is long past due and for which amount plaintiff has demanded payment from the defendant, and defendant has refused and now refuses to pay the same.

(Amended Complaint.)

And plaintiff, for a fifth cause of action, alleges :

I.

That it is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business at Portland, Multnomah County, Oregon, and that at the times hereinafter mentioned it was a corporation duly authorized to transact business in the Province of British Columbia, Canada, with its principal place of business at Prince Rupert, British Columbia, all in accordance with the Foreign Companies Act of the Dominion of Canada.

II.

That the defendant is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey, and duly authorized to transact business as a foreign corporation within the State of Oregon.

III.

That on or about November 16th, 1912, and at various other dates, after plaintiff and defendant entered into a contract for the furnishing of all necessary labor and equipment to erect, and rivet the structural steel of the boiler shop, blacksmith shop and other terminal buildings and dry docks of the Grand Trunk Pacific Company, at Prince Rupert, British Columbia, and while this plaintiff was

(Amended Complaint.)

engaged in said work on said premises, this plaintiff, at the special instance and request of the defendant, performed extra work, which it was understood and agreed that defendant should pay for, during the month of April, 1915, according to an itemized statement, a copy of which is attached hereto and made a part hereof, amounting to \$148.25.

IV.

That during the months of May and June, 1915, plaintiff performed extra work at the special instance and request of the defendant amounting to \$150.00, according to an itemized statement a copy of which is attached hereto and made a part hereof.

V.

That during the month of July, 1915, plaintiff performed extra work at the special instance and request of the defendant amounting to the sum of \$102.15, which it was understood and agreed that the defendant should pay for.

VI.

That said amounts of \$148.25, \$150.30, and \$102.15, making a total of \$400.70, are now long past due and plaintiff has made demand upon the defendant for the payment of said amounts but defendant has refused and now refuses to pay the same, or any part thereof.

(Amended Complaint.)

Wherefore plaintiff demands judgment against the defendant for the sum of \$9232.03, together with the costs and disbursements of this action.

E. L. McDOUGAL,
Attorney for Plaintiff.

STATE OF OREGON,

County of Multnomah,—ss.

I, Otho Poole, being first duly sworn, depose and say that I am the Pres. of plaintiff corporation, in the above entitled action, and that the foregoing amended complaint, is true as I verily believe.

(Sgd) OTHO POOLE.

Subscribed and sworn to before me this 21st day of April, 1916,

(Seal) (Sgd) E. L. McDOUGAL,
Notary Public for the State of Oregon.
My commission expires Sept. 23, 1916.

Filed September 19, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 6th day of May, 1916, there was duly filed in said Court, an Answer, in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,
Plaintiff,

vs.

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,
Defendant.

Answer

Comes now defendant above named and for answer to plaintiff's amended complaint alleges, admits, and denies as follows:

I.

On or about the sixteenth day of November, 1912, defendant entered into a contract with Grand Trunk Pacific Railway Company wherein and whereby defendant agreed to furnish materials for and to construct certain buildings at Prince Rupert, British Columbia, according to certain plans, drawings, and specifications, which plans, drawings, and specifications were made a part of said contract.

II.

In and by the terms of said contract it was agreed by and between defendant and Grand Trunk

(Answer.)

Pacific Railway that defendant should, if defendant so desired, sublet a part of said contract.

III.

Thereafter defendant exhibited and submitted to plaintiff a copy of said plans, drawings, and specifications and invited plaintiff to submit proposals for a contract wherein and whereby defendant should sublet to plaintiff a part of said contract between defendant and Grand Trunk Pacific Railway.

IV.

Thereafter plaintiff submitted to defendant written proposals for the performance of a part of said contract between defendant and Grand Trunk Pacific Railway, which proposals were accepted in writing by defendant, and said proposals and acceptance constituted and do now constitute the contract between plaintiff and defendant mentioned in plaintiff's said amended complaint.

V.

In and by the terms of said contract between plaintiff and defendant plaintiff agreed, among other things, to haul, erect, and rivet steel for the main buildings at Prince Rupert, British Columbia, to furnish and apply thereto two coats of paint, as per specifications, and to haul, erect, rivet, and caulk the steel work for the wing of the dry dock, and defendant agreed, among other things, to deliver

(Answer.)

all steel work to plaintiff on dock at Prince Rupert, British Columbia, and to pay plaintiff therefor eighteen dollars (\$18) per net ton of two thousand (2000) pounds, and it was agreed by and between plaintiff and defendant that said price of eighteen dollars (\$18) per net ton of two thousand (2000) pounds should cover and include the furnishing and applying by defendant of the said two coats of paint, as per specifications.

VI.

At and before the time of making said proposals, and at all times thereafter, it was mutually understood and agreed by and between plaintiff and defendant that said contract between plaintiff and defendant should constitute and the same did in fact constitute a subletting by defendant of a portion of the work contracted for by defendant under its said contract with Grand Trunk Pacific Railway.

VII.

It was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made upon the express understanding, that defendant should deliver said steel to plaintiff by water transportation, and that said steel should be delivered as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work.

(Answer.)

VIII.

Defendant delivered all the steel required by plaintiff under plaintiff's said contract with defendant on dock at Prince Rupert, British Columbia, as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work, and defendant in all respects fulfilled and completed its obligations towards plaintiff under defendant's said contract with plaintiff.

IX.

Said specifications provided, and said contract between plaintiff and defendant was made with the express understanding, that the construction operations on said main buildings and wing of dry dock should at all times be under the full control and management of Grand Trunk Pacific Railway and its officers and agents, and defendant in fact had no connection with the control or management of said construction operations other than to furnish and deliver said steel according to the terms of defendant's said contract with plaintiff, and plaintiff at all times during the course of plaintiff's construction operations on said buildings and wing of dry dock acted at all times under the orders and instructions of Grand Trunk Pacific Railway and its officers and agents and not under the orders and instructions of defendant or of its officers or agents.

(Answer.)

X.

It was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that the pontoons for the wing of the dry dock should be furnished and provided by Grand Trunk Pacific Railway and not by defendant, and said pontoons are the pontoons mentioned in plaintiff's said amended complaint; and it was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that space for storing, assorting, and handling said steel on the dock of Grand Trunk Pacific Railway at Prince Rupert, British Columbia, should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant; and defendant alleges that the loss or damage, if any, suffered by plaintiff owing to delay in furnishing pontoons, re-handling of material, enforced idleness of equipment, and wages and transportation of men, or any of such causes, as alleged in paragraphs III and IV of plaintiff's second cause of action, in paragraphs III and IV of plaintiff's third cause of action, and in paragraphs III and IV of plaintiff's fourth cause of action, and as in plain-

(Answer.)

tiff's said amended complaint set forth, was in no manner due to or occasioned by any act or omission on the part of defendant or of defendant's officers or agents.

XI.

Defendant admits that during the months of April, May, June, and July of 1915, plaintiff performed certain work at the request of defendant, to the value of four hundred and 70/100 dollars (\$400.70), but alleges that said work was at various times ordered by Grand Trunk Pacific Railway and its officers and agents, that said orders were transmitted by defendant to plaintiff, and that, after said extra work was completed, plaintiff's claim therefor to the amount of four hundred and 70/100 dollars (\$400.70) was by plaintiff presented to Grand Trunk Pacific Railway, and said claim was thereafter by Grand Trunk Pacific Railway duly allowed, credit therefor given to plaintiff, and the amount thereof deducted from certain indebtedness due from plaintiff to Grand Trunk Pacific Railway.

XII.

Defendant admits that it is a corporation duly incorporated, organized, and existing under and by virtue of the laws of the State of New Jersey and duly authorized to transact business as a foreign corporation within the State of Oregon.

XIII.

Defendant admits that plaintiff is a corporation

(Answer.)

duly incorporated, organized, and existing under and by virtue of the laws of the State of Oregon with its principal place of business at Portland, Multnomah County, Oregon, and that at all the times mentioned in plaintiff's said amended complaint plaintiff was a corporation duly authorized to transact business in the Province of British Columbia, Canada, with its principal place of business at Prince Rupert, British Columbia, all in accordance with the Foreign Companies Act of the Dominion of Canada.

XIV.

Except as hereinbefore in this answer specifically alleged or admitted, defendant denies each and every allegation of plaintiff's said amended complaint.

Wherefore defendant prays that this action be dismissed with costs to defendant.

TEAL, MINOR & WINFREE,
and ROGERS MAC VEAGH,
Attorneys for Defendant.

STATE OF OREGON,

County of Multnomah,—ss.

I, C. C. Overmire, being first duly sworn, depose and say that I am Contracting Manager of the Bridge and Structural Department of defendant United States Steel Products Company, a corporation, in the above entitled action, that I have read the foregoing answer, know the contents thereof and the same is true as I verily believe.

C. C. OVERMIRE.

(Answer.)

Subscribed and sworn to before me this 6th day of May, 1916.

(Notarial Seal)

ROGERS MAC VEAGH,

Notary Public for Oregon.

My commission expires Nov. 15, 1919.

Filed May 6, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 24th day of May, 1916, there was duly filed in said Court, a Reply, in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES STEEL PRODUCTS COM-

PANY, a corporation,

Defendant.

Reply

Comes now the plaintiff and for reply to defendant's answer on file herein, denies each and every allegation therein, except as to the facts therein contained which are substantially pleaded in plaintiff's amended complaint on file herein.

E. L. McDOUGAL,

Attorney for Plaintiff.

(Reply.)

STATE OF OREGON,

County of Multnomah,—ss.

I, Otho Poole, being first duly sworn, depose and say that I am the Pres. plaintiff corporation, in the above entitled suit, and that the foregoing reply is true as I verily believe.

(Sgd) OTHO POOLE.

Subscribed and sworn to before me this 24th day of May, 1916.

(Notarial Seal) (Sgd) E. L. McDOUGAL,
Notary Public for the State of Oregon.

Filed May 24, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 18th day of October, 1916, there was duly filed in said Court a Verdict, in words and figures as follows:

Verdict

We, the Jury duly impaneled to try the above entitled case, do find our verdict in favor of the plaintiff and against the defendant and assess plaintiff's damages in the sum of (\$7,000.00/100) Seven Thousand and no/100 Dollars.

(Signed) EDW. M. ROBERTS,
Foreman.

Filed October 18, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on Wednesday, the 18th day of October, 1916, the same being the 92nd Judicial Day of the regular July term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Judgment

Now, at this day come the parties hereto by their counsel as of yesterday, whereupon the Jury impaneled herein comes into Court and returns to the Court a Verdict, in words and figures as follows, to-wit:

“We, the Jury duly impaneled to try the above entitled case, do find our verdict in favor of the plaintiff and against the defendant and assess plaintiff’s damages in the sum of (\$7,000.00/100) Seven Thousand and no/100 Dollars.

(Signed) EDW. M. ROBERTS,
Foreman.”

Which verdict is received by the Court and ordered to be entered,

WHEREUPON IT IS CONSIDERED that said plaintiff do have and recover of and from said defendant the sum of \$7,000.00, together with its costs and disbursements herein taxed at \$39.40, and that it have execution therefor, and on motion of said defendant,

IT IS ORDERED that it be and is hereby allowed sixty (60) days from this date within which

(Judgment.)

to file a motion for a new trial herein, and also to submit a Bill of Exceptions herein; and that execution upon the judgment in this cause be stayed during such time.

Filed October 18, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 6th day of December, 1916, there was duly filed in said Court, a Motion for a New Trial, in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,
Plaintiff,

v.

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,
Defendant.

Motion for a New Trial

Comes now the defendant and moves the Court for an order that the judgment in this cause and the verdict of the jury upon which the same is entered be set aside and a new trial granted for the following causes materially affecting the substantial rights of the defendant:

(Motion for New Trial.)

1. That the evidence is not sufficient to justify the verdict of the said judgment.

2. That the verdict and the judgment entered thereon is against law.

3. Error in law occurring at the trial and excepted to by the defendant.

TEAL, MINOR & WINFREE,
ROGERS MAC VEAGH,
Attorneys for Defendant.

Filed December 6, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on Monday, the 18th day of December, 1916, the same being the 36th Judicial Day of the regular November term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Order Denying Motion for New Trial

Now at this time this cause comes on to be heard upon the motion of the defendant for a new trial herein, and is argued by Mr. E. L. McDougal, of counsel for the plaintiff, and by Mr. Wirt Minor and Mr. Rogers Mac Veagh, of counsel for the defendant, on consideration hereof,

IT IS ORDERED and adjudged that said Motion for a New Trial be and the same is hereby denied.

Filed December 18, 1916. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 3rd day of January, 1917, there was duly filed in said Court a Petition for Writ of Error, in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,
Plaintiff,

v.

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,
Defendant.

Petition for Writ of Error

*To the Honorable Judges of the District Court of
the United States for the District of Oregon:*

Comes now United States Steel Products Company, a corporation, petitioner, and defendant in the above entitled cause wherein Poole-Dean Company, a corporation, is plaintiff and said United States Steel Products Company, a corporation, is defendant, by its attorneys, Teal, Minor & Winfree and Rogers Mac Veagh, and feeling itself aggrieved by the judgment entered upon the verdict in said cause on the 18th day of October, 1916, prays that a writ of error may issue and that said United States Steel Products Company may be allowed to bring up for review before the Honorable United States Circuit Court of Appeals for the Ninth Circuit said judgment in said cause under and accord-

(Petition for Writ of Error.)

ing to the laws of the United States in that behalf made and provided; that your petitioner may prosecute said writ of error to the said United States Circuit Court of Appeals for the Ninth Circuit; that said judgment upon said verdict may be reversed by said United States Circuit Court of Appeals for the Ninth Circuit; that upon the giving by your petitioner of security upon said writ of error in the amount of eight thousand dollars (\$8,000), the proceedings of this Court may be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit; and for such other and further relief in the premises as may be just; and your petitioner will ever pray, etc.

Dated January 3, 1917.

UNITED STATES STEEL
PRODUCTS COMPANY.

By Teal, Minor & Winfree,

Its Attorneys.

TEAL, MINOR & WINFREE and
ROGERS MAC VEAGH,

Attorneys for Defendant.

Filed January 3, 1917. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on Wednesday, the 3rd day of January, 1917, the same being the 50th Judicial day of the regular November term of said Court; Present: the Honorable Charles E. Wolverton, the United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,
Plaintiff,

vs.

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporatin,
Defendant.

**Order Allowing Writ of Error Staying Pro-
ceedings, and Fixing the Amount of Bond**

This day coming on to be heard the motion of the United States Steel Products Company, a corporation, defendants in the above entitled cause, by its attorneys, Teal, Minor & Winfree and Rogers Mac Veagh, for an order allowing a Writ of Error in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, and staying proceedings upon the judgment heretofore entered herein until the determination of said Writ of Error, and it appearing to the Court that said defendant has heretofore filed its petition for such Writ of Error and therewith its Assignment of

(Order Allowing Writ of Error.)

Errors, and the Court being fully advised in the premises, it is

CONSIDERED, ORDERED, ADJUDGED and DECREED that a Writ of Error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and it is further

CONSIDERED, ORDERED, ADJUDGED and DECREED that upon the giving by said United States Steel Products Company of security, with proper surety or sureties, acceptable to this Court in the amount of Eight Thousand (\$8,000.00) Dollars, the proceedings of this Court be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals for the Ninth Circuit.

Dated in open Court this 3rd day of January, 1917.

CHAS. E. WOLVERTON,

District Judge.

Filed January 3, 1917. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 3rd day of January, 1917, there was duly filed in said Court a Supersedeas Bond, in words and figures as follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,
Plaintiff,

vs.

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,
Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS,
That we, UNITED STATES STEEL PRODUCTS
COMPANY, a corporation, as Principal, and
UNITED STATES FIDELITY & GUARANTY
COMPANY, OF BALTIMORE, MARYLAND, a
corporation, as Surety, are held and firmly bound
unto Poole-Dean Company, its successors and as-
signs, in the sum of Eight Thousand (\$8,000.00)
Dollars, lawful money of the United States of Amer-
ica, for the payment of which sum well and truly
to be made we and each of us hereby bind ourselves,
our successors and assigns, jointly and severally by
these presents.

Sealed with our seals and dated this 3rd day of
January, 1917.

The condition of this obligation is such that:

WHEREAS, the above named United States

(Supersedeas Bond.)

Steel Products Company, a corporation, has sued out a Writ of Error in the United States Circuit Court of Appeals for the Ninth Circuit, to bring up for review before said United States Circuit Court of Appeals for the Ninth Circuit a judgment rendered by the District Court of the United States for the District of Oregon upon a verdict in the above entitled cause, and

WHEREAS, said United States Steel Products Company, a corporation, has prayed for a reversal by said United States Circuit Court of Appeals for the Ninth Circuit of said judgment rendered by the said District Court of the United States for the District of Oregon, and desires a stay of proceedings in said District Court of the United States for the District of Oregon until the determination of said Writ of Error by said United States Circuit Court of Appeals for the Ninth Circuit:

NOW, THEREFORE, if said United States Steel Products Company shall prosecute its Writ of Error to effect, and answers all damages and costs that may be awarded against it if it fail to make its plea good, including just damages for delay and costs and interest on said Writ of Error, then the above obligation to be void, otherwise to remain in full force and virtue. UNITED STATES STEEL

PRODUCTS COMPANY,

By Teal, Minor & Winfree and

Rogers Mac Veagh,

Its Attorneys.

(Supersedeas Bond.)

UNITED STATES FIDELITY & GUARANTY
COMPANY, OF BALTIMORE, MARYLAND,
(Corporate Seal)

By Douglas R. Tate,
Its Attorney in Fact.

This bond approved this 3rd day of January,
1917.

CHAS. E. WOLVERTON,
Judge.

Filed January 3, 1917. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 3rd day of
January, 1917, there was duly filed in said Court
an Assignment of Errors, in words and figures as
follows, to-wit:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,
Plaintiff,

vs.

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,
Defendant.

Assignment of Errors

Comes now United States Steel Products Com-
pany, a corporation, defendant in the above entitled
cause, and plaintiff in error upon the Writ of Error
prosecuted by it in the above entitled cause, and

(Assignment of Errors.)

makes and files the following assignment of errors upon which it relies in the prosecution of said Writ of Error:

I.

The District Court erred in overruling the objection of the defendant to a paper purporting to be a letter dated November 10, 1915, from Poole-Dean Company to defendant, marked "Plaintiff's Exhibit I," and in admitting said paper in evidence.

II.

The District Court erred in overruling the objection of the defendant to a paper purporting to be a letter dated December 2, 1913, from defendant to Poole-Dean Company, marked "Plaintiff's Exhibit L," and in admitting said paper in evidence.

III.

The District Court erred in overruling the objection of the defendant to the following question propounded by counsel for the plaintiff to the witness Charles O. Dean, to-wit:

"Q. Do you know what the estimate was upon which the steel was supposed to have been handled, assuming that the yards up there were reasonably free and open and there was a reasonable amount of space?",

and in permitting said question to be answered and in admitting any evidence with regard to the esti-

(Assignment of Errors.)

mate of the witness as to the cost of handling the steel under different conditions from those actually obtaining at the site.

IV.

The District Court erred in overruling the objection of the defendant to the following question propounded to the witness, Charles O. Dean, to-wit:

“Q. Would you say in your opinion, based upon your experience, that ninety cents (90c) was a reasonable charge?”,

and in permitting said question to be answered and in admitting any evidence with regard to the opinion of the witness as to what would be a reasonable charge for handling steel under conditions different from those actually obtaining at the site.

V.

Witness C. C. Overmire, after testifying, referring to the conversation that took place between witness and Pillsbury upon the occasion of witness' visit with Poole at Prince Rupert, that absolutely no agreement had been entered into between witness and Pillsbury in reference to the sites of the buildings and the space available for handling material, was asked how he explained the inconsistent terms in his letters (Plaintiff's Exhibits "S", "T", "U", "V", "W" and "X"). To this question defendant objected on the ground that said letters, and every-

(Assignment of Errors.)

thing which witness had said concerning the matter, contained merely representations made by the railway's engineers, but no agreement or promise in regard to the site, and because the form of the question would lead the jury to believe that there was an agreement. Thereupon the Court overruled the objection, ruling that the jury would be the judges as to what constituted the agreement, and would have to take into consideration the correspondence between the parties about the matter and what was said and done between the parties, and in so overruling said objection of the defendant and in making said ruling, the District Court erred.

VI.

The District Court erred in denying the motion of the defendant to instruct the Jury to return a verdict for the defendant, which motion was made and submitted after all the evidence on the part of both plaintiff and defendant in said cause had been introduced and before the Jury retired, and in refusing to instruct the Jury to return a verdict for the defendant.

VII.

The District Court erred in denying the motion of the defendant to instruct the Jury to return a verdict for the defendant upon the first alleged breach of contract and cause of action, which motion was made and submitted after all the evidence

(Assignment of Errors.)

on the part of both plaintiff and defendant in said cause had been introduced and before the Jury retired, and in refusing to instruct the Jury to return a verdict for the defendant upon said first alleged breach of contract and cause of action.

VIII.

The District Court erred in denying the motion of the defendant to instruct the Jury to return a verdict for the defendant upon the second alleged breach of contract and cause of action, which motion was made and submitted after all the evidence on the part of both plaintiff and defendant in said cause had been introduced and before the Jury retired, and in refusing to instruct the Jury to return a verdict for the defendant upon said second alleged breach of contract and cause of action.

IX.

The District Court erred in denying the motion of the defendant to instruct the Jury to return a verdict for the defendant upon the third alleged breach of contract and cause of action, which motion was made and submitted after all the evidence on the part of both plaintiff and defendant in said cause had been introduced and before the Jury retired, and in refusing to instruct the Jury to return a verdict for the defendant upon said third alleged breach of contract and cause of action.

(Assignment of Errors.)

X.

The District Court erred in denying the motion of the defendant to instruct the Jury to return a verdict for the defendant upon the fourth alleged breach of contract and cause of action, which motion was made and submitted after all the evidence on the part of both plaintiff and defendant in said cause had been introduced and before the Jury retired, and in refusing to instruct the Jury to return a verdict for the defendant upon said fourth alleged breach of contract and cause of action.

XI.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court before the Jury retired with the request that it be given to the Jury as follows, to-wit:

“This controversy grows out of an agreement between defendant and the Grand Trunk Pacific Railway in which defendant agreed to furnish all structural steel for the erection of certain buildings for said Railway at Prince Rupert, British Columbia, and to erect said steel all according to certain plans and specifications in writing. These plans and specifications thereby became a part of the defendant’s contract. The defendant reserved the right to sublet the erection of the steel and did sublet

(Assignment of Errors.)

this part of its contract to the plaintiff. Thereby the contract between the plaintiff and defendant became in all respects subject to the plans and specifications according to which the original contract between the defendant and the Railway Company was awarded, and the plaintiff is conclusively presumed to know and is bound by everything contained in the plans and specifications which relate to the erection of the steel."

XII.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court before the Jury retired with the request that it be given to the Jury as follows, to-wit:

"There are four distinct causes of action joined by plaintiff in this case (although five are stated in the complaint), growing out of four alleged breaches of contract on the part of defendant. First (numbered I in the complaint) plaintiff alleges that defendant agreed to deliver the steel completely fabricated, but failed to do so, and later agreed to have plaintiff charge defendant for the necessary fabrication, but failed to pay such charge. This alleged breach of the contract, set forth in the first cause of action does relate to the steel delivered for the dry dock. It is admitted that

(Assignment of Errors.)

the steel for the dry dock was fabricated according to the contract. This first cause of action, therefore, in which plaintiff claims damages in the sum of \$3330.69 is limited to the fabrication of the steel for the foundry, cold storage, blacksmith, boiler and machine shop building and the ship shed. The second alleged breach of contract is set forth in the complaint in the two causes of action numbered therein II and III. These two causes of action should be considered together, as they are claims for damages for alleged delays on the part of the defendant in furnishing pontoons for the dry dock upon which the steel was to be erected. For these alleged delays plaintiff claims damages in the sum of \$2123.64 as the rental value of its plant for the period extending from September 1, 1914, to November 4, 1914, and also claims damages in the sum of \$918.00 for moneys which it claims it was compelled to expend in paying transportation for employees to and from Vancouver, B. C. There is no claim that the steel for all the buildings, except the dry dock, was not furnished in time. The next alleged breach of the contract contained in the cause of action numbered IV in the complaint is that the defendant agreed to furnish storage space for the steel for the dry dock, but failed to do so. This cause of action, therefore, is limited to the steel for the dry dock and

(Assignment of Errors.)

it is admitted that the plaintiff has no complaint for lack of space furnished for the steel for all other buildings. The cause of action numbered V in the complaint is based not upon the original contract but upon the new contract not covered by the original contract at all. In this the plaintiff claims that the defendant ordered some work done, which the plaintiff did; that this work amounted to the sum of \$400.70 and that the defendant has refused to pay for the same."

XIII.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court before the Jury retired with the request that it be given to the Jury as follows, to-wit:

"There is no question between the parties that the pontoons upon which the dry dock were to be erected should be furnished by the Grand Trunk Pacific Railway and not by the defendant, and the defendant owed to the plaintiff no duty to furnish such pontoons at any particular time, but only when the same were furnished to it, the defendant, by the Grand Trunk Pacific Railway. The evidence shows, without contradiction, that any delay in furnishing the pontoons was not due to the defendant but to the Grand Trunk Pacific

(Assignment of Errors.)

Railway Company. I therefore charge you that the plaintiff cannot recover for the alleged delays in furnishing the pontoons and your verdict upon the second and third causes of action must, therefore, be for the defendant."

XIV.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court before the Jury retired with the request that it be given to the Jury as follows, to-wit:

"In regard to the fabrication of the steel for the buildings other than the dry dock, I charge you that the parties did agree that the steel for these buildings should be fabricated by the defendant at the shops; that is to say, should be assembled and riveted together at the shops to the same extent to which similar steel for similar work when transported by ship is ordinarily or usually fabricated; that is to say, usually assembled and riveted. This is a question of fact to be determined by you upon the evidence submitted. The burden of proof upon this question is upon the plaintiff."

XV.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court be-

(Assignment of Errors.)

fore the Jury retired with the request that it be given to the Jury as follows, to-wit:

“A letter from the plaintiff to the defendant dated November 7, 1913, and the answer to the same dated November 11, 1913, both of which are in evidence, define the extent to which the steel should be fabricated, assembled and riveted. I charge you, therefore, that it was the duty of the defendant to fabricate, assemble and rivet steel to the same extent to which similar steel for use in similar buildings is usually fabricated, assembled and riveted when the same is to be transported by ship for export. Whether the steel was so fabricated, assembled and riveted is a question of fact which you will determine from the evidence. You will understand, however, that there is no question between the parties that the steel for the dry dock was fabricated, assembled and riveted in all respects as required by the contract between the parties.”

XVI.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court before the Jury retired with the request that it be given to the Jury as follows, to-wit:

“The contract between the parties provides

(Assignment of Errors.)

that the steel shall be delivered on the dock. It does not provide that any space should be furnished by the defendant for storing, assorting, or handling the steel. The plaintiff was under the contract to receive steel on the dock and to do all things necessary after it was received to erect the building according to the plans and specifications. This included the handling and assorting of the steel wherever necessary. I charge you, therefore, that there was no obligation on the part of the defendant to furnish space for this purpose and that you will, therefore, find a verdict for the defendant upon the fourth cause of action."

XVII.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court before the Jury retired with the request that it be given to the Jury as follows, to-wit:

"The fourth cause of action, as I have stated, grows out of a new and independent contract. It is admitted that the plaintiff did the work and that the value of this work was \$400.70. It is contended on the part of the defendant that the orders to do this work were issued by the Grand Trunk Pacific Railway and were merely transmitted by the defendant to the

(Assignment of Errors.)

plaintiff. If you find from the evidence that this work was ordered by the Grand Trunk Pacific Railway and the orders merely transmitted to the plaintiff by the defendant, then the defendant will not be liable to plaintiff for the value of this work. This is a question of fact to be determined by you from the evidence and the burden of proving that the work was performed for the defendant is upon the plaintiff."

XVIII.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court before the Jury retired with the request that it be given to the Jury as follows, to-wit:

"In regard to the extra work for which the plaintiff claims \$400.70, the defendant alleges in its answer that plaintiff presented a claim for this work in said sum to the Grand Trunk Pacific Railway Company, that the claim was allowed by the Grand Trunk Pacific Railway Company and that the defendant was indebted to the Grand Trunk Pacific Railway Company in a sum exceeding \$400.70 and the amount of this bill was allowed to the plaintiff as a credit upon its indebtedness to the Grand Trunk Pacific Railway Company. If you find from the evidence that the plaintiff did present a claim

(Assignment of Errors.)

for this sum to the Grand Trunk Pacific Railway Company and this claim was allowed, that at the time that it was allowed the plaintiff was indebted to the Grand Trunk Pacific Railway Company in a sum exceeding \$400.70 and that this sum was allowed to the plaintiff as a credit upon such indebtedness, then I charge you that the plaintiff has received compensation for this extra work in this sum and that it cannot recover from the defendant."

XIX.

The District Court erred in refusing to give the following instruction to the Jury, which instruction was presented in writing to the District Court before the Jury retired with the request that it be given to the Jury as follows, to-wit:

"You are instructed that it was the duty of the Railway, and not of defendant, to furnish pontoons for the dry dock wings, and that plaintiff was not bound to begin erection work on said wings until three pontoons had been furnished plaintiff by the Railway. You are also instructed that plaintiff was bound to do all its work upon said wings under the direct supervision of the Railway and was bound to carry out the instructions of the Railway concerning such work. Defendant had no right to give instructions or to exercise supervision over such work except as and when acting on behalf of

(Assignment of Errors.)

the Railway. Therefore, if you find that plaintiff was delayed in erecting said wings by lack of sufficient pontoons, or if you find that plaintiff was instructed to begin erecting said wings before three pontoons had been furnished to plaintiff, in either case your finding will not show any breach of legal duty on the part of defendant, and your verdict upon the second alleged breach of contract and cause of action must be for defendant."

XX.

The District Court erred in instructing the Jury as follows, to-wit:

"Now, to these three causes of action, the second, third, and fourth, the defendant interposes a defense to this effect: That 'said specifications provided, and said contract between plaintiff and defendant was made with the express understanding, that the construction operations on said main buildings and wing of dry dock should at all times be under the full control and management of the Grand Trunk Pacific Railway and its officers and agents.' And it is further alleged that, 'It was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express un-

(Assignment of Errors.)

derstanding, that the pontoons for the wing of the dry dock should be furnished and provided by Grand Trunk Pacific Railway and not by defendant, and said pontoons are the pontoons mentioned in plaintiff's said amended complaint; and it was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that space for storing, assorting, and handling said steel on the dock of Grand Trunk Pacific Railway at Prince Rupert, British Columbia, should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant.'

"So the defense, then, to these three causes of action is based upon the alleged fact that the plaintiff, and that it was so understood by and between the plaintiff and defendant, should look to the Grand Trunk Pacific Railway Company for these rights and privileges, and that it was not to look to the defendant company; that is to say, that the plaintiff was to look to the Grand Trunk Pacific Railway Company for the furnishing of this space that is complained about, and for the time of the beginning of the work, and for the other things that are alleged in these three causes of action, and not to the defendant company. This, of course, is based

(Assignment of Errors.)

upon the fact that the Grand Trunk Pacific Railway Company was making these improvements, and that the contract of the defendant company was made with the Grand Trunk Pacific Railway Company to furnish the materials and to erect the steel in the buildings. And I might say this, in this relation, however: That if it had been the defendant company who was erecting this steel into the buildings, it might be inquired whether or not it was not the duty of the Grand Trunk Pacific Railway Company to furnish adequate space for handling the steel. If that was the case, then the inquiry may be extended—a sub-contract having been let to the plaintiff company to erect this steel and put it into the buildings, whether or not the defendant company did not assume the obligation that would have rested upon the Grand Trunk Pacific Railway Company in the first instance of providing adequate space for the carrying on of the work in riveting this steel and in putting it into the buildings. I submit that, gentlemen of the Jury, for your consideration, along with the alleged contract and the denials thereof, for determination as to whose duty it was to furnish space—whether or not that was a duty devolving upon the defendant company, or whether or not the plaintiff was to look to the Railway Company alone for furnishing that space, and not to the defendant.”

(Assignment of Errors.)

XXI.

The District Court erred in entering a judgment in this cause in favor of the plaintiff and against the defendant.

TEAL, MINOR & WINFREE and
ROGERS MAC VEAGH,
Attorneys for Defendant United States
Steel Products Company, a corpora-
tion, the Plaintiff in Error.

Filed January 3, 1917. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 9th day of January, 1917, there was duly filed in said Court a Bill of Exceptions, in words and figures as follows:

*In the District Court of the United States for the
District of Oregon.*

POOLE-DEAN COMPANY, a corporation,
Plaintiff,

vs.

UNITED STATES STEEL PRODUCTS COM-
PANY, a corporation,
Defendant.

Bill of Exceptions

BE IT REMEMBERED, That on the 12th day of October, 1916, there came on for trial before the

(Bill of Exceptions.)

District Court of the United States for the District of Oregon a certain cause wherein Poole-Dean Company, a corporation, was plaintiff and United States Steel Products Company, a corporation, was defendant, the same being a regular day of the regular term of said District Court, commencing on the first Monday of July, 1916. There were present the Honorable Charles E. Wolverton, presiding; the Clerk of said Court, the Marshal and the bailiffs of said Court. Thereupon the said cause coming on to be heard, the jury was duly impaneled and sworn, plaintiff being represented by Messrs. McDougal & McDougal, its attorneys, and defendant being represented by Messrs. Teal, Minor & Winfree and Rogers Mac Veagh, Esq., its attorneys.

Thereupon the plaintiff introduced evidence to sustain the issues upon its part, and called as a witness one OTHO POOLE, who was duly sworn and testified as follows:

(Testimony of Otho Poole for Plaintiff)

Witness testified that he is President and General Manager of the Poole-Dean Company; that he is acquainted with Mr. Overmire, the contracting manager of United States Steel Products Company; that they made Mr. Overmire a proposal to do the steel work for the erection of the buildings and the pontoons at Prince Rupert, British Columbia, which

(Bill of Exceptions—Testimony of Otho Poole.)

proposal was in writing so far as the price was concerned; that they (defendant) wrote him (plaintiff) a letter about three or four months after they (plaintiff) got the contract; and that plaintiff never got a formal written contract from defendant.

Witness further testified that he first took up with Mr. Overmire the question of erecting the steel at Prince Rupert some time in September, 1912; and thereupon plaintiff offered in evidence the proposal by plaintiff, which proposal was identified by the witness and was introduced in evidence and marked "Plaintiff's Exhibit A," which is as follows:

(Plaintiff's Exhibit "A." Proposal of Poole-Dean Company to United States Steel Products Company)

"POOLE-DEAN COMPANY,
268 North 13th Street,
Portland, Oregon.

November Sixteenth, 1912.

U. S. Steel Products Co.,
Selling Building,
Portland, Ore.

Gentlemen:

We propose to furnish all necessary labor and equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of EIGHTEEN (\$18.00) DOL-

(Bill of Exceptions—Plaintiff's Exhibit "A.")

LARS per ton of 2000#. Material to be delivered on docks at building sites.

Yours very truly,

POOLE-DEAN COMPANY,

OP/AWH

Per Otho Poole."

Witness further testified that he never got an answer to this letter; that he began work at Prince Rupert in November, 1913; that Mr. Overmire instructed him to get his men and equipment to start the job; that Mr. Dean got his men from Vancouver and shipped them up; that he shipped part of his equipment from Portland and part from Vancouver.

Witness further testified that the letter marked Plaintiff's Exhibit "A" was accepted verbally; that when he figured the job, Mr. Overmire told him "If we get the job you will get it"; that witness kept in touch with Mr. Overmire right along after he figured the work; that he was up at Mr. Overmire's office one day and Mr. Overmire said to him, "Well, we have got that job up north"; that it ran along for some time and that he asked Mr. Overmire about the contract at different times and that a letter was written by Mr. Fey, as witness had told Mr. Overmire that he would like to have something in writing to show that he was going to get the contract.

Witness further testified that after Mr. Overmire notified him to start the job, he sent Mr. Dean up right away to get ready to handle the steel; that

(Bill of Exceptions—Testimony of Otho Poole.)

when this thing first came up, Mr. Overmire called him up to the office and took up the matter with him, told him that this job was coming up up north and that they would have to go to Seattle to get plans to figure the job; that after they got to Seattle, they found there were no plans there they could get and Mr. Overmire said they had better go on up to Prince Rupert; that Mr. Overmire said they could see the site, make up the figure and would know more about the thing, and it would be better to go up there any way; that he and Mr. Overmire went up to Prince Rupert and got the plans there and went over the thing and discussed this whole matter, that is, the shipping and the site and the whole thing while they were there.

Witness further testified that at that time he took up the matter of shipping with Mr. Overmire and asked him how the steel was going to be shipped; that Mr. Overmire said he didn't know at that time, that they might ship it two or three different ways,—by boat, to Vancouver by rail and up by car-ferry, or to Vancouver by rail and up by barges; that witness told Mr. Overmire that his reason for asking this was that sometimes shipping by boat they might ship this steel knocked down in order to save on freight; that Mr. Overmire told him that would not be the case because it made no difference to the Steel Products Company as they shipped it on their own boats and that the stuff would come riveted up; that Mr. Overmire told him

(Bill of Exceptions—Testimony of Otho Poole.)

to base his figure on everything being riveted at the shop that could be riveted.

Witness further testified that he told Mr. Overmire that he had to ship his men from Vancouver and wanted to know, when Mr. Overmire gave orders to start this work, if he would be able to complete it before having to tie up because he would have to ship his men back and pay traveling time and transportation on them, and it would run the expense of the job up if he had to ship men up two or three different times; that Mr. Overmire told him he would not give orders to start the job until he could complete it; that is, when he gave him orders, he would be able to complete the job before he would have to ship the men back.

Witness further testified that he and Mr. Overmire went down to the dock to see the site and that Mr. Overmire took up with Mr. Pillsbury the question of where the steel could be landed; that Mr. Pillsbury was the representative of Mr. Donnelly, and Mr. Donnelly was the engineer in charge of the work for either the Grand Trunk Pacific Railway or the Grand Trunk Pacific Development Company; that Mr. Overmire asked Mr. Pillsbury how much space he could have for handling this material, and that Mr. Pillsbury assured him he could have all the space that he needed; that witness based his figure on getting this space; that they talked of how witness was to handle the job; that witness was assured that he would not have to

(Bill of Exceptions—Testimony of Otho Poole.)

touch the material until it was landed on the dock; that witness shipped up two different derricks and engines and that, after he got up there, there was so much other stuff on the dock that the material had to be scattered around in different places and that he could not use the rig he shipped up for handling the stuff in the yard.

Witness further testified that they could not furnish any space to leave this material lay; that when the building-stuff came in, it was scattered around in half a dozen different places; that there were six buildings in all besides the floating dry dock; that he was to put up the steel in both the buildings and the dry dock.

Witness further testified that Mr. Overmire notified him to send his men up there about November, 1913; that witness had the engineer's plans to look at when he made his offer to the Steel Products Company; that there were no other plans covering the steel work except the Steel Products Company's own plans; that witness never saw the Steel Products Company's plans to figure the job; that the first witness saw the plans to go over them was when he was notified to start the job; that he gave the plans to Mr. Dean to take up with him to start the work, and that that was the first he and Mr. Dean knew that this material was coming knocked down.

Witness further testified that he took the plans and went up to Mr. Overmire's office the day before

(Bill of Exceptions—Testimony of Otho Poole.)

Mr. Dean left for Prince Rupert, and took the matter up with Mr. Overmire; that witness said, "This stuff, according to your plans, is coming knocked down, and you know we never figured it that way. I am going to bill you for the cost of this work when the job is finished. I am going to keep accurate cost on it and bill you for it when the job is finished. When is the contract going to be ready? I don't like to send Dean up because there is a lot of other stuff that is liable to come up if we haven't got that written contract ready"; that Mr. Overmire said, "I don't know what is the matter with it. I have been taking it up with them right along and I haven't got it yet. But you go up and start the job, because I am going to handle the thing here, and we will settle everything satisfactorily"; that upon that statement witness sent Mr. Dean up.

Witness further testified that he saw the material after it arrived at Prince Rupert; that he could tell from the shop detail plans, as distinguished from the engineer's plans, whether the material was coming, as witness called it, "knocked down" or not; that this stuff is built up in the shop, put together in the shop as completely as they can be put together for shipping; that they were using the kind of trusses that run to a point in those buildings, triangular in shape; that in building these trusses in the shop, they are built up of angles and plates, and these plates and angles are

(Bill of Exceptions—Testimony of Otho Poole.)

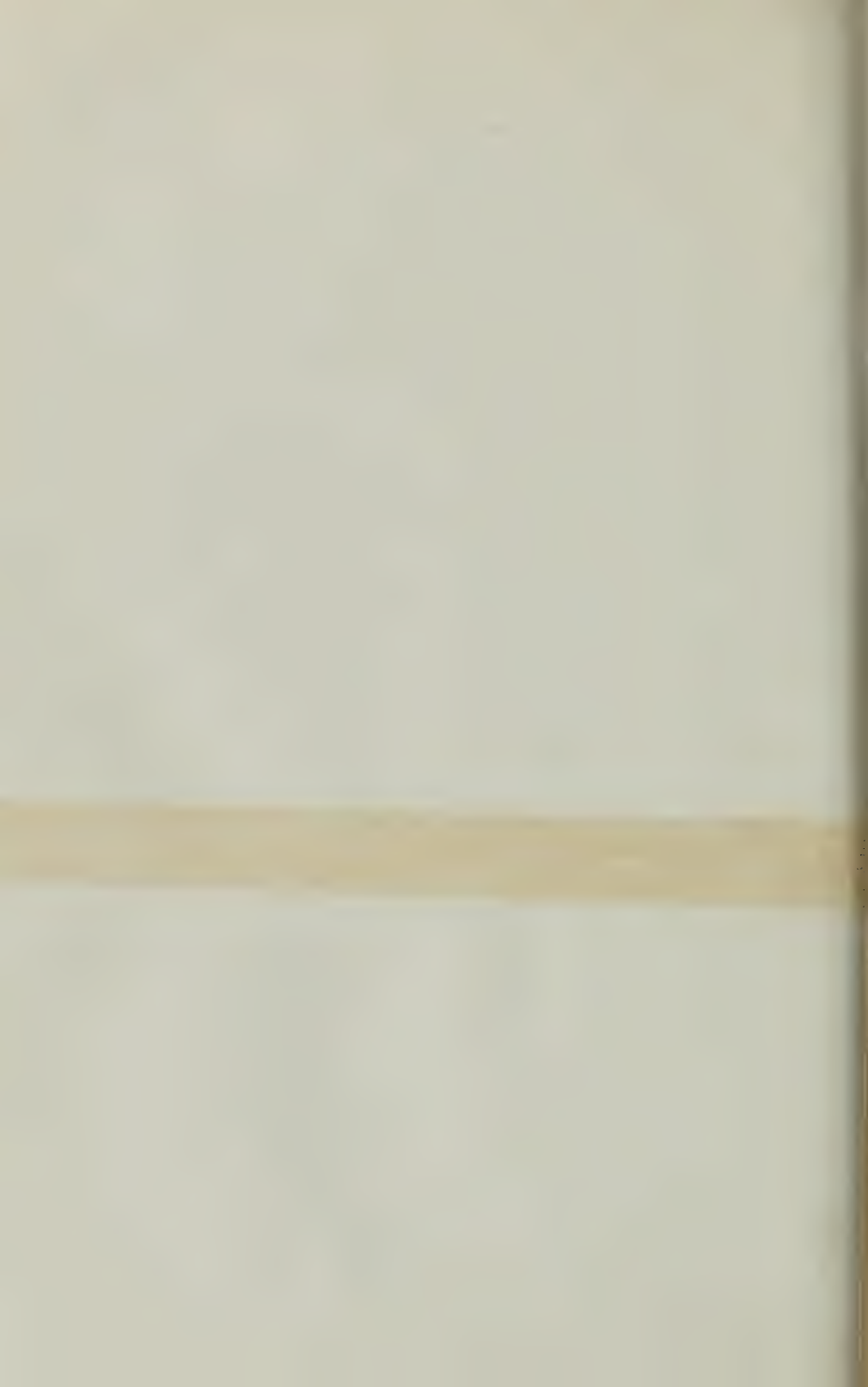
put together and riveted up in the shop; that this stuff was just bunched and none of it put together, just shipped out in bundles, boxes; that he did not expect the steel that came out for the dry dock to be riveted up.

Witness further testified that plaintiff's claim for One Hundred Sixty-six and 95/100 (\$166.95) Dollars for fabricating was for trusses; that the biggest part of the coal storage plant was little trusses and that they came out all knocked down, in small pieces; that the angle irons and other parts of steel that build up the trusses in question were disconnected from the trusses, and he had to rivet them together and build the trusses up; that if it came out as it should have come in one of those trusses, he would have probably twenty-five or thirty rivets to drive, and the two main sections of the trusses to put together; that when it comes knocked down, there must be pretty close to one hundred pieces in it; that that stuff has all got to be looked up and put together; that it increases the rivets at least three or four times as much as he would have to rivet if it had been shipped out as it was supposed to be shipped. Witness further testified that part of the steel for the ship shed was riveted and part of it was loose; that if it had all been knocked down, the charge for extra riveting and extra shop work would have been more than Eight Hundred Nineteen Dollars and Sixteen cents (\$819.16); that this amount

(Bill of Exceptions—Testimony of Otho Poole.)

was arrived at by Mr. Dean, keeping the time every day as the job went along; that witness got the information as to what trusses came knocked down and what came properly assembled from the plans.

Thereupon plaintiff offered in evidence a plan of the power house, ship repair and ship building plant of the Grand Trunk Pacific Railway, which plan was identified by the witness and was introduced in evidence and marked "Plaintiff's Exhibit B."



(Bill of Exceptions—Testimony of Otho Poole.)

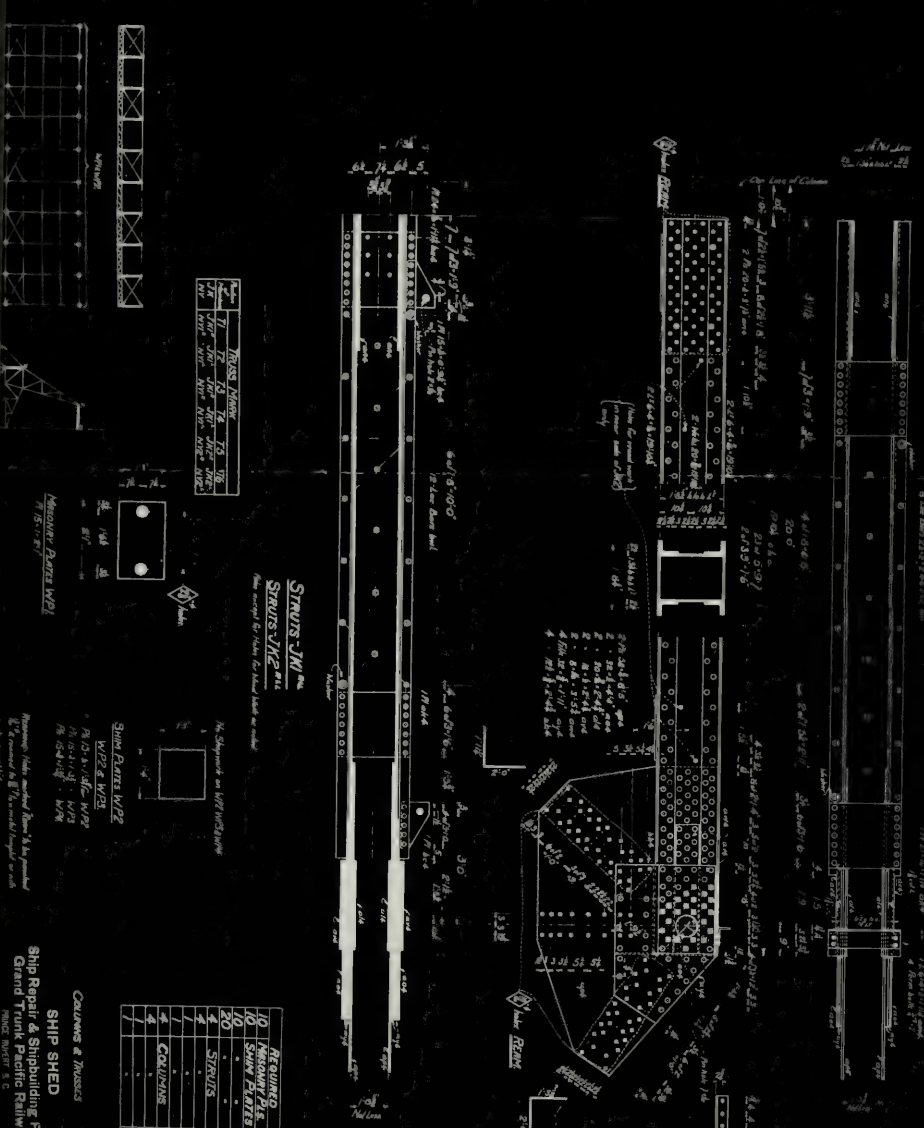
Thereupon witness further testified that he had seen other prints like said Plaintiff's Exhibit "B"; that said Plaintiff's Exhibit "B" showed a half section of one of the trusses that came knocked down, marked "X"; that the drawing marked "Y" was the truss after it is put together; that the white dots at the point marked "G" represent rivet holes, and the circles represent driven rivets; that the drawing shows by the markings, either by a solid circle or a ring, whether or not the rivet is to be driven or has been driven in the shop; that if this particular truss had come properly riveted, as he maintained, there would have been four different pieces of it to put together in the field; that according to this drawing the truss came in twenty pieces.

Witness further testified that the first time he saw the shop detail plans was when Mr. Dean got ready to go to Prince Rupert; that at that time he examined the shop detail plans for the blacksmith, the machine and boiler shops; that the item in the complaint of Five Hundred and Seventy-nine (\$579.00) Dollars, covering extra assembling work for the blacksmith, machine and boiler shops, was arrived at by keeping time every day; that the charge for extra assembling on the power house, Two Hundred Seven Dollars and Thirty-nine cents (\$207.39), and on the foundry building, Four Hundred Eighty-one Dollars and Fourteen cents (\$481.14), were arrived at in the same way.

(Bill of Exceptions—Testimony of Otho Poole.)

Witness further testified that a lot of the gusset plates on the columns on the trusses of the ship shed were shipped loose; that some of them came riveted on, and some of them came loose; that the biggest part of them were left off; that the ship shed contained the biggest part of these gusset plates.

Thereupon plaintiff offered in evidence a blue print, which was identified by witness, received in evidence and marked "Plaintiff's Exhibit C".



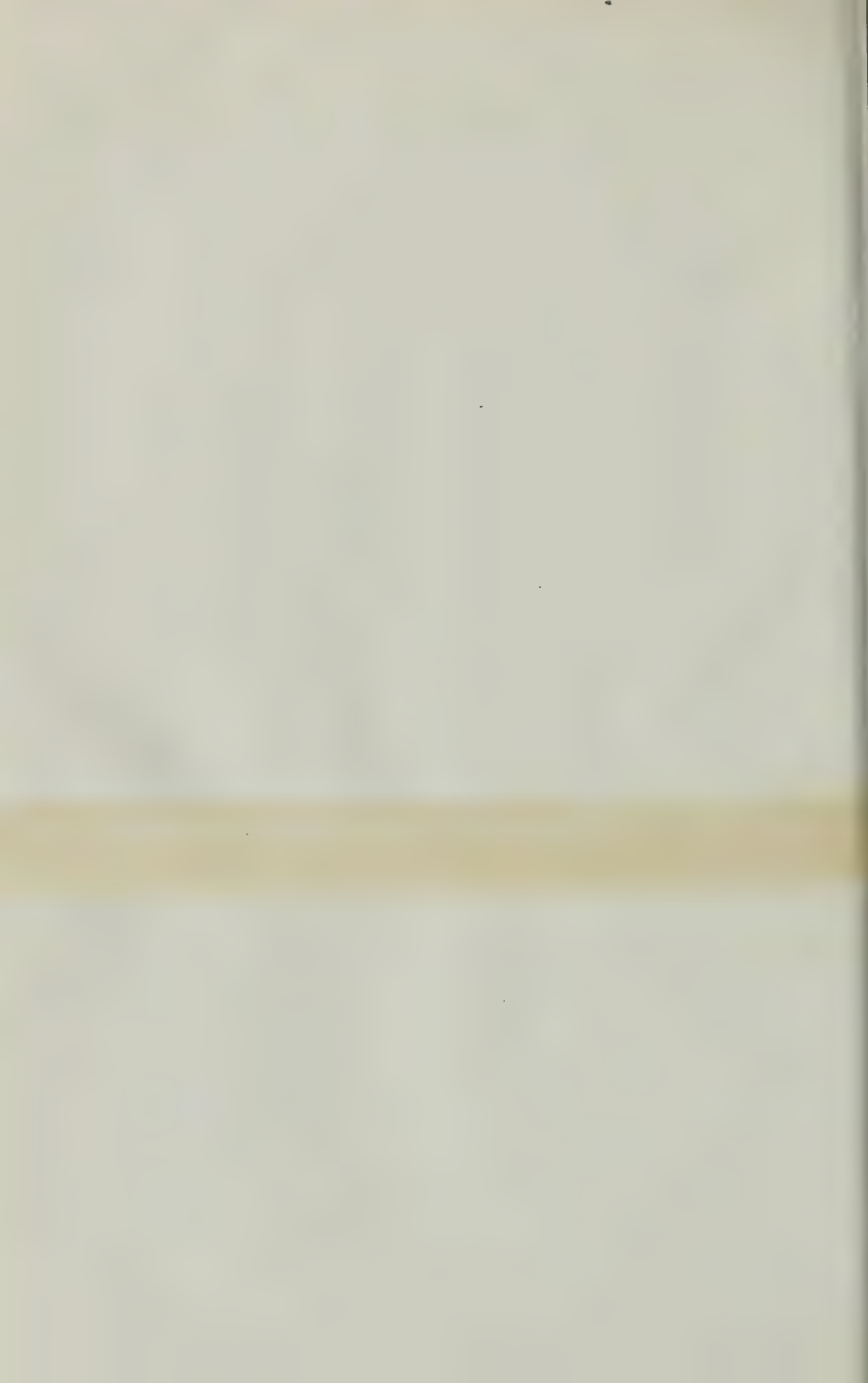
REQUIRED	
10	MEASURING P.S.
10	SHIM PLATES
10	"
20	"
4	STIRUPS
4	"
1	"
1	"
4	COLUMNS
4	"
1	"
1	"

171

◁

SHIP SHED

Trunk Pacific Railway,
PRINCE GEORGE B. C.



(Bill of Exceptions—Testimony of Otho Poole.)

Witness further testified that the drawing marked "X" on said Plaintiff's Exhibit "C" was a gusset plate; that this gusset plate was riveted on as it should have been riveted; that most of the gusset plates came out not riveted up like this one; that those unriveted gusset plates came out on the ship shed.

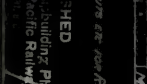
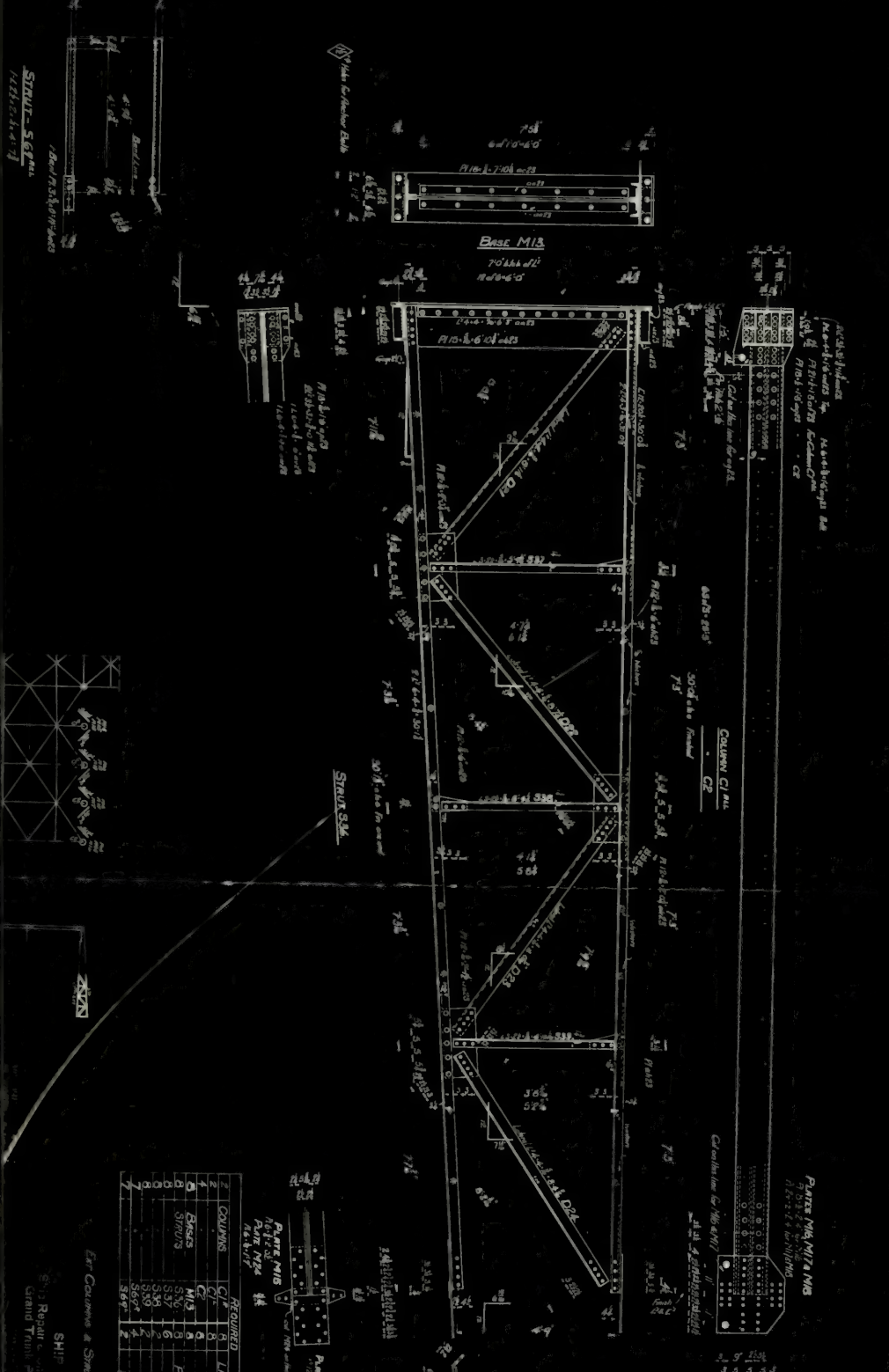
Thereupon plaintiff offered in evidence a blue print, which was identified by witness, received in evidence and marked "Plaintiff's Exhibit D".

(Bill of Exceptions—Testimony of Otho Poole.)

Witness further testified that it was a gusset plate shown on said Plaintiff's Exhibit "D," marked "M," and that it was shipped loose; that this gusset plate "M" was a small gusset plate that is supposed to be driven in the shop.

Witness further testified that he did not know why the shop detail plans showed one gusset plate, marked "X" on Plaintiff's Exhibit "C," riveted in the shop, and the other, marked "M" on Plaintiff's Exhibit "D," to be driven in the field.

Thereupon plaintiff offered in evidence two blue prints, which were identified by the witness, received in evidence and marked "Plaintiff's Exhibit E" and "Plaintiff's Exhibit F".



SHIP SHED
Repair & Building Pl
Cano Thru Pacific Railw
1911-1912

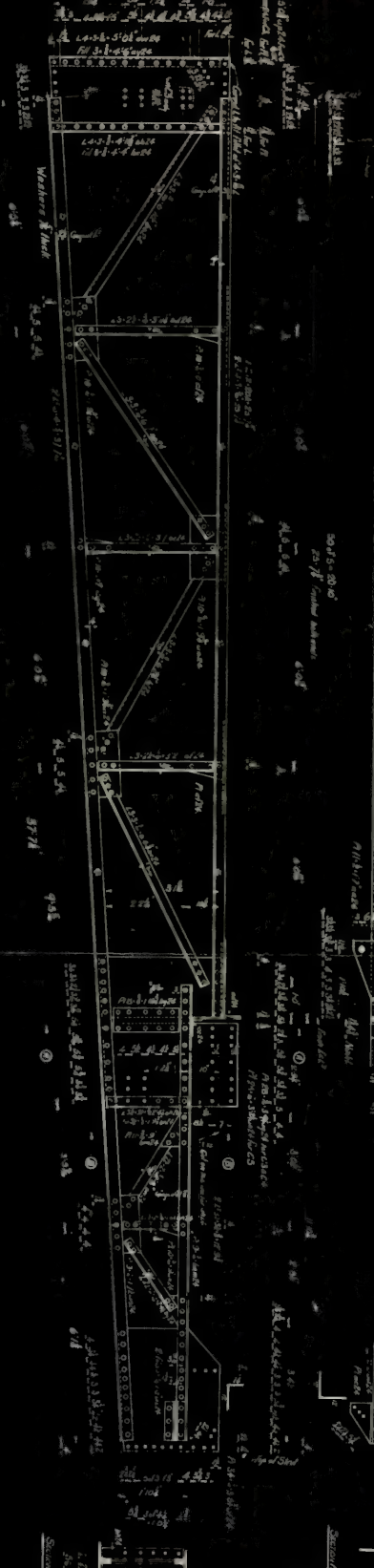
SHIP SHED
Repair & Building Pl
Cano Thru Pacific Railw
1911-1912

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Repair & Building Pl
Cano Thru Pacific Railw
1911-1912

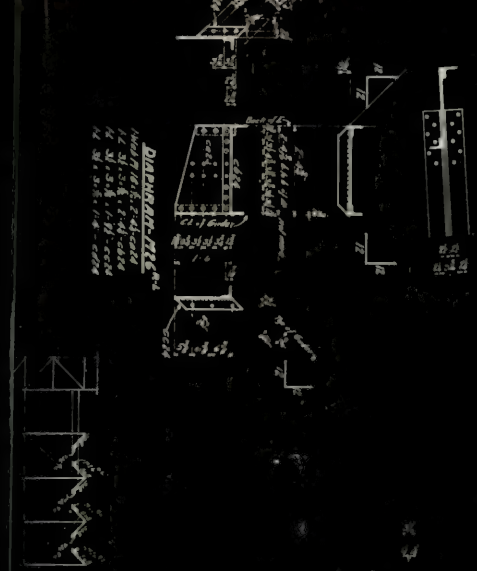
SHIP SHED
Repair & Building Pl
Cano Thru Pacific Railw
1911-1912

SHIP SHED
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Cano Thru Pacific Railw
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SHIP SHED
Repair & Building Pl
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1911-1912



COLUMNS C3RD, C4RD, & C5RD

57NUT-561
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REQUIRED	
1	COLUMN
2	COLUMNS
1	COLUMN
12	STAIRS
6	DIGITALS
6	"

WANTED
Building
Sole Representative
Grand Teton
Office Pa

(Bill of Exceptions—Testimony of Otho Poole.)

Witness further testified that said Plaintiff's Exhibit "E" was a blue print of a piece of crane-run extension, what he termed a column, for the runway for the crane in the ship shed; that it was sent out knocked down, that he arrived at that conclusion from the way the rivets are shown at the point marked "A"; that the piece of steel work should have been assembled in the shop and the rivets driven at the point marked "A" before shipment.

Witness further testified that at the time he and the defendant entered into their contract, Mr. Overmire assured him that they would rivet everything in the shop, that is, the stuff would be as completely riveted up in the shop as they could rivet it.

Witness further testified that the blue print, marked "Plaintiff's Exhibit F," was the top section of one of these same columns; that it is completely riveted up, whereas the bottom part of the column, as shown in Plaintiff's Exhibit "E," is not completely riveted up; that the piece of steel shown on Plaintiff's Exhibit "F" was shipped the way witness expected it.

Witness further testified that he took up with Mr. Overmire the question of the steel arriving at Prince Rupert without, as he claimed, all of the shop work being done, the first time when they were figuring the work; that at that time witness saw the engineer's plans, not this set of plans or a dupli-

(Bill of Exceptions—Testimony of Otho Poole.)

cate thereof; that the engineer's plans do not show how the steel would arrive, but show an outline truss; that he cannot recall everything that was on the plans, but that they show the size of angles, plates, and things like that; that, as a general rule, they do not show any rivets or how the steel will be shipped; that when Mr. Dean got ready to go to Prince Rupert, witness turned the plans over to him, and Mr. Dean discovered that the stuff was knocked down; that they went up to see Mr. Overmire; and that Mr. Overmire gave him written instructions which led him to send Mr. Dean up to Prince Rupert.

Thereupon plaintiff offered in evidence certain letters, which were identified by the witness, received in evidence and marked "Plaintiff's Exhibit "G," and "H," which are as follows:

(Plaintiff's Exhibit "G")

"UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Portland, Oregon, March 24, 1913.

Subject: XAB-3283-85 incl.

Prince Rupert Buildings.

Messrs. Poole-Dean Co.,

Portland, Oregon.

Gentlemen:

Referring to your conversation with our Mr.

(Bill of Exceptions—Plaintiff's Exhibit "G.")

Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific Buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection.

As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert.

Our formal contract with you for the erection will be drawn up as soon as conditions permit.

Trusting this letter will give you the necessary authority for making your arrangements for your part of the work, we remain,

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

Contracting Manager.

By Frank E. Fey,

Contracting Agent.

F-C

Cy to W. H. Stratton."

(Plaintiff's Exhibit "H")

"UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Subject: XAB—3281-86 incl.

Grand Trunk Railway System.

Portland, Oregon, May 3, 1913.

Messrs. Poole-Dean Co.,
Portland, Oregon.

Gentlemen:

Referring to the Prince Rupert work, I would advise you that we expect to ship all of the material for the buildings on a steamer leaving New York about the middle of August.

The steel for the dry dock will leave New York on a steamer sailing between the first and 15th of October. This means there will be two shipments of material from New York, instead of three as originally contemplated.

We are giving you this information so that you may make the necessary arrangements; and I have also notified Mr. Donnelly of these facts, in order that the contractors who are preparing the foundations, etc., may have their work ready in time.

You of course appreciate the fact that it will take 90 to 100 days for the steamer to reach Prince Rupert after sailing from New York; but it might be well for you to get in touch with Mr. Pillsbury or Stirrat & Goetz's representative at Prince Rupert

(Bill of Exceptions—Plaintiff's Exhibit "H.")

and ascertain the condition of the site at the present time, and also as to their anticipated progress.

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

CCO-C

Contracting Manager."

Witness further testified that the contract between Poole-Dean Company and United States Steel Products Company, referred to in said Plaintiff's Exhibit "G," was never drawn up; that the reference in said Plaintiff's Exhibit "H" to the effect that the material would leave the East by boat was the first that witness knew how it was coming.

Witness further testified that he sent Mr. Dean up in November, 1913; that he shipped his equipment, consisting of tools, compressors, engines, derricks, and all the stuff that he used; that Mr. Dean began erecting steel some time in December, 1913; that the steel came by water; that he kept a crew up there until he was tied up for the pontoons.

Witness further testified, in explaining plaintiff's second cause of action for delay and for the reasonable rental of the equipment, that the usual rental on stuff of that kind is ten per cent of what it cost, and that he billed for that for two months.

Thereupon defendant objected to any evidence concerning measure of damages for delay beyond the legal rate of six per cent per year on the value of

(Bill of Exceptions—Testimony of Otho Poole.)

the property, upon the ground that damages for withholding property for any length of time should be ascertained by estimating the value of the property and giving the legal rate of interest for the time plaintiff was deprived of the use of such property, and that the reasonable rate of interest would be six per cent per annum.

Thereupon the Court sustained the objection of the defendant and ruled that the plaintiff should be limited, in proving plaintiff's damages for delay, to six per cent per annum, or the legal rate of interest in Canada, and to this ruling of the Court the plaintiff excepted and said exception was allowed.

Witness further testified that the value of the equipment he had tied up from September to November, 1914, was approximately Ten Thousand Six Hundred Eighteen Dollars and Nineteen Cents (\$10,618.19); that the claim for Nine Hundred and Eighteen Dollars (\$918.00), contained in plaintiff's third cause of action, was for shipping eighteen (18) men from Prince Rupert to Vancouver, for their transportation and traveling time.

Witness further testified that there was an agreement between plaintiff and defendant that plaintiff would not have to shut down, that is, any expense which was caused if he had to shut down, he was led to believe he would be reimbursed for; that he notified Mr. Overmire three months before he would have to shut down and told him what expense he would be put to, and expected to be reim-

(Bill of Exceptions—Testimony of Otho Poole.)

bursed for this expense; that he explained to Mr. Overmire when he figured the job that he would have to get all his men in Vancouver; that it was necessary for him to shut down because the pontoons were not ready to go ahead with the work.

Witness further testified, referring to plaintiff's fourth cause of action for Twenty-four Hundred and Fifty-nine Dollars (\$2459.00), on account of moving the material and extra handling, that Mr. Overmire said that he would furnish all the space plaintiff needed; that witness spoke to Mr. Overmire before taking Mr. Dean up there about writing this contract, that all these things might come up, and that was why witness wanted a written contract; that Mr. Overmire said, "You need not worry about that. We have taken care of that in our proposal to the Grand Trunk Company"; that the stuff was supposed to be delivered to him on the dock with the space that he needed for handling the material; that when he got up there, this stuff was unloaded and piled on the dock, and when he went back to start the job, lumber and stuff were piled around; that when he started the job, riveting frames for the pontoons, there was not room enough on the dock to handle the frames as they were riveted up; that he had to have a barge to take that stuff away on account of shortage of space; that the items of Twenty-four Hundred and Fifty-nine Dollars (\$2459.00) covered the extra handling of the steel that was put into the pontoons, that is all the same

(Bill of Exceptions—Testimony of Otho Poole.)

thing as the dry dock which is on the pontoons; that Mr. Overmire paid for handling the extra steel for the buildings before witness started the dry docks.

Witness further testified that he had an estimated cost of this item of Twenty-four Hundred Fifty-nine Dollars (\$2459.00); that he had to get the plates that went on one particular part of the job out, then pile the rest on top of some of the other stuff, and then when he had to get at the other stuff, he had to move it back; that he had about one-quarter of the space he needed for handling the job; that his estimated cost on the job was ninety cents (90c) a ton, it cost something over Five Thousand Dollars (\$5000.00); that witness could not recall the figures; that he billed defendant for One Dollar (\$1.00) a ton, that is, it was about Seven Hundred Dollars (\$700.00) over and above his estimated cost that he had allowed himself.

Witness further testified that he took up the claim for space with the defendant by letter, and explained to him how he arrived at these figures when he sent them the bill.

Plaintiff thereupon offered in evidence a certain letter, dated November 10, 1915, to the introduction of which defendant objected upon the ground that plaintiff was seeking the wrong method of establishing damages; that plaintiff was giving what they estimated the work would cost, then saying what it actually did cost and putting the amount of damages at the difference between the two; that the

(Bill of Exceptions—Testimony of Otho Poole.)

proper measure of damages would be the reasonable value or cost of moving the stuff, not what plaintiff may have paid or what it may have cost them.

Thereupon the Court overruled the objection of the defendant and admitted said letter in evidence, and to this ruling of the Court defendant excepted and the said exception was allowed, and said letter was admitted in evidence and marked "Plaintiff's Exhibit I," which is as follows:

(Plaintiff's Exhibit "I")

"POOLE-DEAN COMPANY,
Portland, Oregon.

10 November, 1915.

United States Steel Products Company,
Portland, Oregon.

Gentlemen:

GRAND TRUNK PACIFIC DRYDOCK,
PRINCE RUPERT, BRITISH COLUMBIA.

Referring to telephone conversation, today, between your Mr. Fay and the writer, regarding the charge for the rehandling of Dry Dock Material; we wish to say, that the total cost of handling and sorting the Dry Dock Material on the dock was \$5,429.32.

This high cost of handling and sorting the dry dock material was due to the crowded condition of the dock. We did not have more than one-fourth the

(Bill of Exceptions—Plaintiff's Exhibit "I.")

space we needed, and this necessitated the handling and rehandling of the same pieces many times.

Our estimated cost of handling and assorting was \$0.90 the ton, which for 2,459 tons equals \$2,213.10, leaving a difference of \$3,216.22. We have billed you for \$2,459.00 of this extra expense, and we have absorbed the remainder of \$757.22.

You have a representative on the ground who can explain the crowded conditions under which we worked.

We cannot understand why the explaining of this extra charge should delay the payment of what is due us on the original contract. We shipped about 20 extra men from Vancouver to Prince Rupert, at our own expense, in order to rush this work, and we finished the work about five weeks ahead of time, and the work has now been completed about four months and we have not been paid for it. We do not think that we are getting fair treatment, and we would like to know definitely just when we are going to get our money. An early reply will be greatly appreciated.

Yours very truly,

POOLE-DEAN COMPANY,

By Otho Poole,

O.P/R

President."

Witness further testified that he had been engaged in the contracting business, structural steel

(Bill of Exceptions—Testimony of Otho Poole.)

erection, for himself since 1911; that prior to that time he had charge of work for Smith-Rice Company since 1907; that he was familiar with charges for handling steel work on the job; that his charge here was based upon what he knew the stuff to be worth to handle under ordinary conditions, conditions that he was promised, that that was what the ninety cents (90c) a ton was based on; that there was a reasonable profit in that ninety cents (90c) a ton if he had had the space to handle the stuff; that the seven hundred and some odd dollars that he sued for here was not the profit, but was part of that extra cost; that he stood that part of the extra cost himself; that the Three Thousand Two Hundred Sixteen Dollars and Twenty-two cents (\$3,216.22), based upon a reasonable profit, was the extra cost for handling and that he only billed defendant for Twenty-four Hundred and Fifty-nine Dollars (\$2459.00); that he had absorbed enough there so that there could not be any claim by defendant that he should have stood some of it himself; that, according to his experience, he would say that the charge which he had made for this extra handling was a reasonable one.

Witness further testified, referring to the fifth cause of action for Four Hundred Dollars and Seventy cents (\$400.70), that it covered extra work which he did in connection with that work and billed the United States Steel Products Company for; that these bills were all checked up and O.K.'d

(Bill of Exceptions—Testimony of Otho Poole.)

after the work was done, and that the amount was agreed upon; that these charges were taken up with him after the work was done, and that he went over it with Mr. Fey, and that it was all satisfactory; that he did not recall who ordered this extra work; that he was not on the job, but that Mr. Dean was; that he had an understanding with Mr. Overmire that any of that work that came up, that he would go ahead and do, and that then they would thresh it out afterwards; that in erecting that stuff, little things come up that must be fixed right away, some shop mistake or something like that; that he generally does them and then settles up afterwards; that all agreed that the price was all right.

Witness further testified that some time after this bill was sent to defendant, Mr. Fey took it up with the witness and wanted to know if the witness would bill the Grand Trunk Company for it; that he billed the Grand Trunk Pacific for this amount because Mr. Fey wrote him a letter and asked him to.

Thereupon plaintiff offered in evidence a letter, which was identified by the witness, received in evidence and marked "Plaintiff's Exhibit J."

(Plaintiff's Exhibit "J")

"POOLE-DEAN COMPANY,

Portland, Oregon.

17th November, 1915.

United States Steel Products Company,

Portland, Oregon.

Gentlemen:

GRAND TRUNK PACIFIC DRY DOCK,

PRINCE RUPERT, B. C.

Referring to your letter of November 11th, regarding bills for extra work, it was never understood by us that these bills should be paid by the Grand Trunk Pacific Development Company, as this work was done in accordance with your orders; and we shall expect you to make settlement for same.

However, in accordance with your request, contained in this letter, we are today mailing the Grand Trunk Pacific Development Company copies of the itemized bills, as follows:

April account	\$129.60
May and June accounts.....	150.30
July account	102.15
1200 rivets for float frames.....	17.50
Freight on rivets.....	1.15

Amounting to\$400.70

As soon as we receive payment for the above, we shall turn it over to you.

This transaction in no way relieves you from

(Bill of Exceptions—Plaintiff's Exhibit "J.")

settlement of these bills, all of which are now four months or more overdue.

Very truly yours,

POOLE-DEAN COMPANY,

By Charles McGonigle.

CMcG/H

Encs.

Witness further testified that after Mr. Dean went to Prince Rupert and the steel arrived, he was notified by wire sent from Mr. Overmire.

Thereupon plaintiff offered in evidence a telegram, which was identified by the witness, received in evidence and marked "Plaintiff's Exhibit K."

(Plaintiff's Exhibit "K")

"GOVERNMENT TELEGRAPH SERVICE.

Department of Public Works.

Dominion of Canada.

44hge 68 NL

Portland, Ogn, Nov 29-13

C. O. Dean,

Central Hotel,

Prince Rupert, B. C., Canada.

Pillsbury's message rec'd princerupert steamer will unload on dock your contract states you will receive material on wharf which means as steamer delivers. Am leaving for New York tonight will have steele see poole and wire me in any event you must handle material as steamer unloads will ar-

(Bill of Exceptions—Plaintiff's Exhibit "K.")

range details with poole which shall be satisfactory to all parties concerned will wire later regarding signing ships papers receipt steel.

1015pm.

C. C. OVERMIRE."

Witness further testified that after this wire was received he refused to handle the steel; that he told Mr. Steele, Contracting Agent for the United States Steel Products Company, that it was not in his contract.

Thereupon plaintiff offered in evidence a letter dated December 2, 1913, which was identified by the witness, and to which defendant objected on the ground that it was incompetent, irrelevant, and immaterial, inasmuch as it did not concern any of the issues made by the pleadings, there being no charge in the complaint for the matter concerned or damages predicated upon it.

Thereupon the Court overruled the objection of the defendant and admitted said letter in evidence, and to this ruling of the Court defendant excepted and said exception was allowed, and said letter was received in evidence and marked "Plaintiff's Exhibit L."

(Plaintiff's Exhibit "L")

"UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Portland, Oregon, December 2, 1913.

Subject: Prince Rupert Work.

Messrs. Poole-Dean Co.,

Portland, Oregon.

Gentlemen:

This will authorize you to receive the material which is now being unloaded at Prince Rupert from the ships' tackles.

It is understood that the details for extra charges on this account are to be arranged between you and Mr. Overmire upon his return from the East.

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

By C. W. Steele,

Contracting Manager.

Contracting Agent.

CWS-C

Cy to C. C. Overmire.

W. H. Stratton."

Thereupon defendant objected to any evidence concerning Plaintiff's Exhibit "L," upon the ground that it was incompetent, irrelevant, and immaterial, inasmuch as it did not concern any of the issues made by the pleadings, there being no charge in the complaint for the matter concerned or damages

(Bill of Exceptions—Testimony of Otho Poole.)

predicated upon it. Thereupon the Court overruled the objection of the defendant, and to this ruling of the Court the defendant excepted and said exception was allowed. The witness, however, offered no further testimony in this regard.

(Cross-Examination of Otho Poole for Plaintiff)

Upon cross-examination, the witness testified that the Grand Trunk Pacific Development Company, to whom he sent the bill for Four Hundred Dollars and Seventy cents (\$400.70) never sent him any money for it. The witness was then asked whether the Grand Trunk Pacific Development Company did not give him credit for what he owed them to that amount. To this question plaintiff objected as incompetent, irrelevant, and immaterial, upon the ground that the matter was between the United States Steel Products Company and the Grand Trunk Pacific Development Company.

Thereupon the Court overruled the objection, and to this ruling of the Court the plaintiff excepted and said exception was allowed.

Thereupon, in response to the question previously asked, witness testified that he did not know what became of the bill after he sent it to the Grand Trunk Development Company; that Mr. McGonigle handled that; that plaintiff owed the Grand Trunk Development Company some money, more than Four Hundred Dollars (\$400.00); that witness did not know whether the Grand Trunk Development Com-

(Bill of Exceptions—Testimony of Otho Poole.)

pany gave plaintiff credit for that amount, on what plaintiff owed them or not; that witness thought they wrote Mr. McGonigle a letter saying that they would give plaintiff credit for that amount, and that Mr. McGonigle wrote them back another amount; that witness did not know just how they did adjust that, nor just what the final outcome was.

Witness further testified that when he first went up to Prince Rupert with Mr. Overmire, there was mostly water on the ground; that they had just started the dock; that they saw the plans and specifications after they got there, in Pillsbury's office; that witness and Mr. Overmire had the plans together, and Mr. Overmire read the specifications over; that he expected to do the work according to the specifications but there was a lot of stuff they didn't include, that Mr. Overmire said he wasn't going to include, and that witness just gave him figures on certain portions of it; that witness did not figure the job according to specifications; that he figured it subject to the acceptance of the engineer; that if he had figured it according to the specifications, he would have included everything that was in them.

Witness further testified that he knew that everything was to be done under the supervision of Frank E. Kirby or William T. Donnelly, or their authorized representative, but that witness was not under them; that witness was working under the

(Bill of Exceptions—Testimony of Otho Poole.)

United States Steel Products Company; that witness knew he had to do the work under the men on the ground for Frank E. Kirby or William T. Donnelly, that is, an inspector; that the inspector could not direct witness, that witness took no orders from the inspector whatsoever; that the inspector transmitted his orders to Mr. Overmire, and that witness got his orders from Mr. Overmire; that the inspector had the right to direct Mr. Overmire to direct the witness how the work should be done; that witness knew what work he did under his instructions had to be done according to the inspector's directions.

Witness further testified that he understood the Grand Trunk Development Company were to build the pontoons themselves; that he did not understand that the United States Steel Products Company was to build them; that witness understood that the Grand Trunk Development Company was to furnish the pontoons to the United States Steel Products Company, and that the United States Steel Products Company was to furnish them to witness.

Witness further testified that he understood that the work on the dry dock was supposed to commence in May; that when he figured the job, it was figured that the pontoons would be ready about the first of May; that the contract witness made provided that he should start whenever Mr. Overmire ordered him to; that the contract, upon which

(Bill of Exceptions—Testimony of Otho Poole.)

Mr. Overmire was figuring, provided that witness should start work on the pontoons when three pontoons were delivered by the Grand Trunk, and that the work on the dry dock was not to commence until the Grand Trunk Development Company should furnish three pontoons.

Witness further testified that he could not recall whether he read the specifications or heard them read; that he and Mr. Overmire had the specifications up there, and that witness supposed he must have read them; that he remembered the three pontoons part; that he never paid any particular attention to it; that he was not governed by the paragraph in the specifications providing how the work on the dry dock should be carried on at all; that he was governed by a contract he had with Mr. Overmire; that at that time Mr. Overmire had no contract with the Grand Trunk Development Company.

Witness further testified that he and Mr. Overmire went up there and got the specifications and plans to see what kind of work had to be done; that witness figured on erecting this stuff and riveting it for Mr. Overmire; that he does not need any specifications to do that class of work; that he has done enough of it to know what has got to be done, what is expected; that he went with Mr. Overmire to get the plans in order to figure the job; that he did not know what part of the work he would include when he went up there; that when he got

(Bill of Exceptions—Testimony of Otho Poole.)

the plans, he found out how much work he had to do from examining it; that he found out about the pontoons by examining the specifications; that he found out the details of the work from examining the specifications; that he could not tell how many trusses there were without looking at the plans and specifications; that he could tell by looking at the plans, but not at the specifications; that after examining the plans, he could tell exactly how much work he had to do; that he could not tell when he was to do his work after examining the plans and specifications; that he did not figure starting by the specifications at all; that Mr. Overmire was supposed to notify him when to start; that he did not know when the job was going to start; that the specifications were not ready for six months after they were supposed to be ready.

Witness further testified that the plans are drawings, and the specifications are written; that some things are mentioned in the specifications that are not shown on the plans; that both plans and specifications are not necessary in order to bid on a job unless everything in the contract is taken; that steel work can be figured from the plans alone, not from the specifications alone; that the specifications cover things not shown in the plans; that the matter of painting would be covered by the specifications.

Witness further testified that he undertook to paint part of the job, but not the whole of it, only

(Bill of Exceptions—Testimony of Otho Poole.)

the buildings; that he put some paint on the dry dock which he got paid extra for that was not part of his contract; that Mr. Overmire read the specifications over and said, "Certain things we will include, and certain things we won't include. You give me a figure on erecting and riveting this dry dock only"; that witness figured on erecting and riveting only; that he figured on furnishing the compressor, but not like the one specified; that he knew the specifications called for a compressor, and for a bigger one than witness had; that he did not read the specifications, that Mr. Overmire read them; that witness heard them read.

Witness further testified that he was concerned with the boiler, machine and blacksmith shop, the power house, the foundry, the ship shed, and the coal storage buildings, as well as the dry dock; that he was figuring on putting up only the steel work of these buildings; that there were two or three different contractors on the rest of the work; that he understood that the steel work could not be done until after the other work, the foundations, which the other contractors had to do, had been done.

Witness further testified that when he went up there the first time, the engineer, Mr. Pillsbury, pointed out where the docks would be built, that is, as near as he could; that at that time the whole place was covered with water, except a little dock.

Witness further testified that Mr. Oevrmire said that they would rivet everything in the shop that

(Bill of Exceptions—Testimony of Otho Poole.)

they could rivet; that he said he didn't know how this stuff would come; that he said, "We don't know how they will ship it. It may come to Vancouver and up by car-ferry, or it may come to Vancouver and up by barge."

Witness further testified that, as concerns the steel which he had handled, there had never been any difference in the way in which it was fabricated in the shop when it was shipped by water and when shipped by rail; that he has handled steel shipped by water from New York to Portland, Oregon; that that steel was trusses for the Lincoln High School; that they were bigger than any of the ones in this case; that they were furnished by Milliken Brothers; that those trusses came broken in the center, just as witness had explained the ones in this case should have been; that those trusses were too long to ship; that witness had done the freight shed for the O. W. R. & N. Company, the steel for which had been shipped from New York to New Orleans by water and from there by rail; that the specifications for the work on the Lincoln High School were prepared in Portland, Oregon; that he did not see the specifications before he bid on the Lincoln High School; that he bid on the Lincoln High School just from the steel plans, the engineer's or architect's plans; that the specifications do not show whether the trusses will come riveted together or not; that these plans are gotten out, and that witness knows how that stuff is coming.

(Bill of Exceptions—Testimony of Otho Poole.)

Witness further testified that Mr. Overmire said, "We will rivet everything in the shop that we can"; that Mr. Overmire did not tell him that the stuff would be riveted up or fabricated and shipped in the manner customary for that class of work.

Thereupon defendant offered in evidence a letter dated September 11, 1914, which was identified by the witness, and which letter was received in evidence and marked "Defendant's Exhibit 1," which is as follows:

(Defendant's Exhibit 1)

"POOLE-DEAN COMPANY,
Portland, Oregon.

11 September, 1914.

United States Steel Products Company,
Portland, Oregon.

Gentlemen:

Referring to:

GRAND TRUNK PACIFIC TERMINALS—
PRINCE RUPERT, BRITISH COLUMBIA.

We are handing you, herewith, bills for extra field work amounting to \$3,330.69, due to our being compelled to perform work in the field which it is customary to have done in the shop. These charges are the actual costs of labor and insurance, and does not include any charges for administration, tools, coal, etc.

When we made the proposal for this work we

(Bill of Exceptions—Defendant's Exhibit 1.)

were advised by your Mr. Overmire, that all of the material would be fabricated and shipped in the manner customary for this class of work. As you are aware, it is customary to ship material of this character mostly riveted together, and not "knocked down."

Our proposal was to erect, rivet and paint this work, which proposal was accepted by you. There was no mention of any field assembling or riveting which is ordinarily done in the shops. Before we started this work we took the matter up with Mr. Overmire and advised him that we would do the work, keep accurate charge of it, and bill you for it as soon as it was completed.

The writer has had charge of the erection of all classes of steel work along the Pacific Coast for the past eight years, much of which was mill building work of a character similar to these buildings, and had been shipped by water from New York, and in no case was the material shipped "knocked down" unless special mention was made of it before the contract was signed.

There was considerable time between the original proposal and the time the work started, and it was your duty to advise us if you intended to ship the material in any other manner than the customary manner.

Yours very truly,

POOLE-DEAN COMPANY,

By Otho Poole."

O.P/B

(Bill of Exceptions—Defendant's Exhibit 2.)

Thereupon defendant offered in evidence a letter dated November 7, 1913, which was identified by the witness, received in evidence and marked "Defendant's Exhibit 2," and which letter is as follows:

(Defendant's Exhibit 2)

"POOLE-DEAN COMPANY,
Portland, Oregon.

November 7th, 1913.

U. S. Steel Products Co.,
City.

Gentlemen:

In looking through our files we find that we have misplaced copies of our original proposals on the main buildings and wings of the dry dock at Prince Rupert.

It is our understanding we are to erect, rivet and paint two coats on main buildings for \$18.00 per ton of 2000[#]; on wings of dry dock we are to erect, rivet and caulk for \$18.00 per ton of 2000[#], all material to be delivered to us on dock at building site.

If the above is in accordance with your understanding we will ask that you confirm same at your earliest convenience in order that our records may be complete. Thanking you in advance, we are

Yours very truly,

POOLE-DEAN COMPANY,

OP/AWH

Per Otho Poole."

(Bill of Exceptions—Defendant's Exhibit 3.)

Thereupon defendant offered in evidence a letter dated November 11, 1913, which was identified by the witness, received in evidence and marked "Defendant's Exhibit 3," and which letter is as follows:

(Defendant's Exhibit 3)

"UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.
Portland, Oregon.

November 11, 1913.

Subject: Prince Rupert Buildings.

Messrs. Poole-Dean Co.,
Portland, Oregon.

Gentlemen:

We have your letter of the 7th instant which states that you have misplaced copies of your original proposal on the buildings and wings of the Dry Dock on the above subject.

Your understanding is, in accordance with ours that: you are to haul, erect and rivet the steel for the buildings, for Eighteen Dollars (\$18.00) per net ton of 2000#, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet and caulk the steel work for the wings of the Dry Dock, for Eighteen Dollars (\$18.00) per net ton of 2000#.

(Bill of Exceptions—Defendant's Exhibit 3.)

All steel work to be delivered to you on dock at
Prince Rupert, B. C.

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

Contracting Manager.

By Frank E. Fey,

Contracting Agent.

F-C

Cy to W. H. Stratton."

Witness further testified that the plans prepared by Milliken Bros. upon the Lincoln High School were really shop details; but the ones he figured from were not prepared by Milliken Bros., but were just the same as the plans in this case; that witness did not remember whether he figured the freight shed from shop details or not; that the railroad company sometimes get out their own plans; that there might have been some shop details out on that.

Witness further testified that when he was up at Prince Rupert with Mr. Overmire, he didn't do any talking, that Mr. Overmire did the talking himself; that witness heard Pillsbury talk and that he knew that the defendant was not to furnish the docks, and had nothing to do with furnishing the docks; that there was a discussion between Mr. Overmire, Pillsbury and the witness at that time as to where wit-

(Bill of Exceptions—Testimony of Otho Poole.)

ness would store this stuff, taht Mr. Overmire asked the witness about how much space he would want; that witness explained to Mr. Overmire, and then Mr. Overmire took it up with Pillsbury, and Pillsbury informed Mr. Overmire that he could have all the space that he needed; that witness was present at that conversation; that he understood Pillsbury, the people he represented, were to furnish the space for storing the stuff, for the steel and handling it on the dock.

Witness further testified that with his understanding with Mr. Overmire, witness was to handle the steel after it was landed at the dock; that Pillsbury told Mr. Overmire that Mr. Overmire could have the space; that witness did not rely upon that statement; that Mr. Overmire was under obligation to witness to furnish that space, because witness took that up with him before he shipped men up; that witness said, "I don't want to send men or equipment up there until this thing is in writing"; that Mr. Overmire said, "Everything will be all right. I protected you in my proposal to the Grand Trunk Development Company."

Witness further testified that he and Mr. Overmire went up there to get the plans; that witness went up after the job was started; that when he and Mr. Overmire went up there they went over the plans and things like that and discussed the whole situation; that witness did not know exactly where each building was to be put, knew approxi-

(Bill of Exceptions—Testimony of Otho Poole.)

mately where they were supposed to be; that he got the dimensions from the plans; that he did not know just how much there would be of the dock and all he heard was what Pillsbury told him; that Pillsbury pointed out about where the dock would run.

Witness further testified that the first shop detail plan he saw was when Mr. Dean was going to Prince Rupert to start the job; that he had received some of the plans long before that, but they came in a bundle and he laid them by; that he never had any occasion to use them; that when Mr. Dean got ready to go up there, he got the plans down to take up with him and that was the first that the witness remembered of seeing the plans; that these plans contained the shop details; that he did not know just how long he had had them since they had been delivered to him; that these plans comprised some of the buildings, that he did not get all of the plans until after he had started the job; that he could look up and find out, when he got them, but he could not remember now just when he got them.

Witness further testified that he got the plans that Dean had before November 7, 1913; that when he examined those plans that Dean had was the first he discovered that the steel was not riveted up as much as he expected it to be; that he had those plans when he wrote the letter of November 7, 1913 (Defendant's Exhibit 2); that he must have had some of the plans at that time although he did

(Bill of Exceptions—Testimony of Otho Poole.)

not know just what plans he had; that he thought he had some of these shop detail plans at that time; that he thought the letter of November 7, 1913 (Defendant's Exhibit 2), was written before Mr. Dean started up there, but he was not positive.

Witness further testified that he could not say what the object was for leaving off the gusset plate on one of the shop details and riveting it on the the other (Plaintiff's Exhibits "C" and "D"), unless it was to save freight, that is, it would not take up so much room in the boat; that there is just as much danger of gusset plates and connections being broken off from the main columns when shipped by rail as there is by water, that even hauling them on the job they are broken and bent; that it has been witness' experience that, if it is put in the boat properly, it will not get bent any worse than it will by rail.

Witness further testified that most of the trusses that came knocked down were about forty (40) and fifty (50) feet long, very small trusses, and approximately six (6) or seven (7) feet deep at the biggest point; that in trusses of that size, the size of the truss would make no difference as to getting them all riveted to go in the boat or not; that the hatches on the boat are so big that they can take care of anything like that; that they can handle practically anything in a boat that they can handle by ordinary cars, according to witness' experience, on stuff that he has handled.

(Bill of Exceptions—Testimony of Otho Poole.)

Witness further testified that he did not know that defendant was going to ship by water until Mr. Overmire notified him; referring to the letter from Mr. Overmire, May 3, 1913, (Plaintiff's Exhibit "H"), that witness did not know whether it was that letter or another one which first notified him that the steel was coming by water; that every time he would see Mr. Overmire there would be something that came up about that job.

Witness further testified that he never received a written contract; that Mr. Fey called him up to defendant's office one day to look over a contract that was drawn up, and that witness never heard anything more from it; that witness read it over and neither approved nor disapproved it, but was waiting for it; that Mr. Fey had to send it back to New York; that witness suggested some changes, but did not know whether the changes were made before the contract was sent back; that defendant has a standard form of contract; that the stuff he has done for them was on what was supposed to be their standard form; that he has had some contracts but did not remember enough about them to know whether he could recognize one of the same kind or not; that he had signed them and worked under them but did not know whether they had been changed since then or not; that it was a printed form and that the contract was being prepared on one of those printed forms.

Witness further testified that the values put

(Bill of Exceptions—Testimony of Otho Poole.)

upon the list of property at Prince Rupert at the time of the delay were secured from an invoice that was made by Mr. Dean at the time he sent it down; that the date on the list was July 5, 1915; that there may be some small items as to which witness could not say whether they were there at the time of the delay or not; that the valuation represented the reasonable value of the cost of the stuff, allowing for wear and tear at the time the inventory was taken; that some of the stuff on the list was bought new for the job and some of it had been used for approximately a couple of years; that witness could not tell what part was bought for the job, or what part had been used for a couple of years or more.

Witness further testified that the compressor put on the list had been used for about a year and a half when it went up; that the value put on the compressor was Three Hundred and Nine Dollars (\$309.00); that it cost Three Hundred and Seventy-five Dollars (\$375.00) new; that Mr. Dean made the list up so that it could be given to Mr. Overmire; that witness did not know whether Mr. Dean made the list up to sell it to the Grand Trunk Pacific, or not.

Witness further testified that the complaint charged for only moving the steel in the dry dock; that his estimate on the cost of the work was ninety cents (90c) a ton, including erecting, riveting, handling and painting, if any; that in charging in the complaint for this extra handling, he took the

(Bill of Exceptions—Testimony of Otho Poole.)

cost of the entire job and subtracted the ninety cents (90c) a ton which he figured it would cost, then charged One Dollar (\$1.00) a ton for handling, absorbing Seven Hundred (\$700.00) and some dollars himself; that the job cost over Five Thousand Dollars (\$5,000.00); that there were approximately Two Thousand Four Hundred Fifty-nine (2,459) tons in the job; that he deducted from the actual cost of sorting and handling it at ninety cents (90c) a ton, which he had figured in his contract, and charged defendant with the difference, less a certain part which he had absorbed himself, because he always expected some question to come up of why he didn't absorb some of it; that he charged defendant for a dollar a ton and stood all over that himself.

Witness further testified that the material was landed on the edge of the dock with these plates piled three and four feet deep; that that was exactly where the material was supposed to be landed; that the contract called for the steel to be landed on the dock, and that it was landed on the dock; that the rest of the steel was to be landed on the dock too, just the same as the other stuff; that it was landed on the dock; that the contract said it was to be landed on the dock; that the material for the dry dock was scattered around in different places; that defendant paid for scattering it around and that plaintiff handled it; that plaintiff's men did the work for defendant; that witness turned the

(Bill of Exceptions—Testimony of Otho Poole.)

crew and the rigging over to the defendant; that Mr. Dean superintended the job; that his men did the work and his superintendent superintended the job; that the men doing the work were his employees.

Witness further testified that the only delay for which plaintiff was undertaking to recover, was delay in building the dry dock; that before he was tied up, he had a discussion with Mr. Overmire, and witness told him he would bill him for the work; that witness wrote Mr. Overmire a letter from Portland; that he wrote the letter because Mr. Dean notified him that the pontoons were not going to be ready; that Mr. Dean was on the job, saw the pontoons building, and knew how long it would take to build them.

Witness further testified that he remembered Mr. Pillsbury insisting that plaintiff start work on two pontoons; that witness took no orders from Mr. Pillsbury; that Mr. Pillsbury wrote him a letter instructing him to start on two pontoons, and that he took it up with Mr. Overmire, and that Mr. Overmire said that "your contract is with me. You are looking to me for these delays and if you take any orders from Pillsbury and there is another tie up, I won't be responsible."

Thereupon defendant offered in evidence a letter dated September 26, 1914, which was identified by the witness, received in evidence and marked "Defendant's Exhibit 4," which is as follows:

(Defendant's Exhibit 4)

"J. H. PILLSBURY,

Civil Engineer,

Prince Rupert, B. C.

Resident Engineer G. T. P. Dry Dock.

Prince Rupert, B. C., September 26th, 1914.

Poole-Dean Co.,

Portland, Oregon.

Gentlemen :

This is to inform you that the second pontoon was launched last Tuesday, the 22nd inst., and that the two pontoons are now awaiting the beginning of the erection of the wings by you. I am informed by Mr. Donnelly that he has taken up with the U. S. Steel Company this question and that he regards it as very necessary that a start at steel erection be made with two pontoons.

Please let me know at once how soon you can start work.

Yours truly,

J. H. PILLSBURY."

Thereupon defendant offered in evidence a letter, dated September 30, 1914, which was identified by the witness, received in evidence and marked "Defendant's Exhibit 5," which is as follows :

(Defendant's Exhibit 5) ¹

"30 September, 1914.

Mr. J. H. Pillsbury, Civil Engineer,
Resident Engineer Grand Trunk Pacific,
Prince Rupert, British Columbia.

Dear Sir:—

We have your letter of September 26th, stating that the second pontoon was launched September 22nd. As our contract is with the United States Steel Products Company, it is necessary that we should receive written instruction from them before starting this work.

We are prepared to begin this work at any time, and we wish to know if you can allow us sufficient space upon the dock to rivet the bulkheads and frames.

We have instructed the Canadian Northwest Steel Company to ship a crane stop to you, and Mr. Dean will put it in place as soon as he returns to Prince Rupert.

Thanking you for the information, we are,

Yours very truly,

POOLE-DEAN COMPANY,

O.P./L

By....."

Thereupon witness further testified that, upon receiving the letter from Mr. Pillsbury (Defendant's Exhibit 4), he did not start work; that he started when he got orders from Mr. Overmire, some time in November, 1914; that he did not be-

(Bill of Exceptions—Testimony of Otho Poole.)

gin until then because he had not received orders from Mr. Overmire; that that was the only reason he did not commence before then; that it was during this period that the delay, of which plaintiff complained, occurred; that this delay began some time in August or September, and continued until November.

Witness further testified that Mr. Pillsbury and his company threatened to seize plaintiff's plant and do the work themselves but did not do it; that witness could not recall whether Mr. Dean wrote him to that effect or not, but thought that either Mr. Fey or Mr. Overmire had notified witness of receiving a letter from Mr. Donnelly stating that if plaintiff did not proceed with the work immediately under Mr. Donnelly's instructions, Mr. Donnelly would take the work away from plaintiff; that plaintiff told Mr. Fey or Mr. Overmire that Mr. Donnelly was welcome to take it, and that witness would start upon getting orders from the defendant; that witness was not positive whether a letter, dated November 9, 1914 (Defendant's Exhibit 6), was the first order that he had from defendant to commence work or not; that witness thought Mr. Overmire wrote him another letter telling him to get ready to start.

Thereupon defendant offered in evidence a letter, dated November 9, 1914, which was identified by the witness, received in evidence and marked "Defendant's Exhibit 6," which is as follows:

(Defendant's Exhibit 6)

“UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT,
PORTLAND, OREGON.

November 9, 1914.

Subject: Prince Rupert Dry Dock.

Grand Trunk Pacific Ry. Terminals.

Messrs. Poole-Dean Co.,

Portland, Oregon.

Gentlemen:

This is to advise you to proceed at once with the erection of the steel work for the dry dock at Prince Rupert.

Kindly acknowledge receipt of these instructions in order that we may know the matter has your attention.

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

Contracting Manager.

By Frank E. Fey,

Contracting Agent.

FC

CC to W. H. Stratton,

E. J. Schneider.

Copy to Prince Rupert Office 10th October, 1914.”

Thereupon witness further testified that his men were brought back to Vancouver some time in August, 1914.

(Redirect Examination of Otho Poole for Plaintiff)

Upon redirect examination of the witness, plaintiff offered in evidence a letter, dated November 27, 1914, which was identified by the witness, received in evidence and marked "Plaintiff's Exhibit M," which is as follows:

(Plaintiff's Exhibit "M")

“UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT,
PORTLAND, OREGON,

Nov. 27, 1914.

Poole-Dean Company,
268 North 13th St.,
Portland, Oregon.

Gentlemen:

For your information I wish to advise that under date of November 19th Mr. Pillsbury advised me that two pontoons were launched on the 18th inst., making four now in the water.

Inasmuch as there can be no question but that enough pontoons are launched so that your crews can keep at work for some considerable time, and furthermore because of the fact that on receipt of instructions from Mr. Pillsbury to have work resumed at Prince Rupert, I hope you will lose no time in getting to work on the wings of the dry

(Bill of Exceptions—Plaintiff's Exhibit "M.")

dock and carrying this work through as fast as possible to completion.

Yours very truly,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

Contracting Manager.

By C. C. Overmire,

Contracting Manager.

CCO

Thereupon witness testified that, as to the scattering of the steel for the pontoons about the yards, United States Steel Products Company was paying the bills; that he just turned the men and equipment over to the Steel Products Company to handle the stuff when it came; that the men were on his pay roll; that he did not charge anything for the use of the rigging or for Mr. Dean's time; that Mr. Dean was looking after the matter and was in charge; that Dean had to put the steel in any place where he could find space to pile it; that the space was taken up with other material.

Witness further testified, referring to the letter of May 3, 1913 (Plaintiff's Exhibit "H"), that there was nothing said between him and Mr. Overmire as to how the steel was to come by boat in the event that it did so come, or about how many boats it would come on; that he did not even know that it was coming by boat; that Mr. Overmire told him

(Bill of Exceptions—Testimony of Otho Poole.)

that if it came by boat, it would come on their own boats; that witness did not know what line, or whether defendant chartered their boats or owned them or what.

Witness further testified that the trusses in the Lincoln High School came by water from New York; that they were larger trusses than the trusses in this case; that the trusses for the freight shed which witness handled came from New Orleans by water and were then shipped overland; that witness started the Multnomah County Court House; that there were trusses on the last wing of the Court House, and that that was the time he left Smith-Rice Company; that the trusses on the Court House were about the same size as some of those in this case; that they came from Milliken Bros. all the way by water; that they were fabricated complete, all in one piece.

Thereupon the plaintiff, to sustain the issues upon its part, called as a witness one CHARLES O. DEAN, who was duly sworn and testified as follows:

**(Direct Examination of Charles O. Dean
for Plaintiff)**

Witness testified that he was connected with the plaintiff company during the fall of 1912 as an officer of the company; that he never saw the shop detail plans for the work at Prince Rupert, B. C.,

(Bill of Exceptions—Testimony of Chas. O. Dean.)

until about a day or two before he left for Prince Rupert; that they were sent to his office in Portland and that he was looking over them there; that he and Poole took the plans and went up to Mr. Overmire's office, and in going over the plans they told Mr. Overmire that the plans showed the material coming knocked down, which was not in their contract; that it was to come out riveted up, and that they would expect defendant to pay for the extra riveting; that the only response witness heard was that Mr. Overmire told Poole to go ahead; that witness took no active part in the conversation at that time; that he was going through the plans and did not get the whole conversation; that there was conversation other than that which he had related, but that he did not get it.

Witness further testified that he left Portland for Prince Rupert in November, 1913, to superintend the erection of the buildings and dry dock work there for plaintiff; that he began erecting steel some time in December; that he began first on the foundry; that the foundry had trusses but no deep struts, just double angles.

Witness further testified that he saw the trusses for the foundry as they arrived at Prince Rupert from the boat, and that they all came knocked down; that they should have been riveted in half sections; that the trusses all came just the angles bundled together; that he had to examine the truss work and rivet it on the site; that it all should have

(Bill of Exceptions—Testimony of Chas. O. Dean.)

have been done at the shop; that that is shop work; that the trusses must have been in thirty (30) pieces, approximately.

Witness further testified that there were gusset plates on part of this foundry job, and that they were all loose on the main truss; that the gusset plates on the small lean-tos were riveted on the chord.

Witness further testified that in erecting the foundry, he kept an account of the amount of cost involved in doing what he claimed was extra field work; that he made a memorandum at that time; that, referring to such memorandum, the extra cost involved in doing the shop work for the foundry ran over Four Hundred (\$400.00) Dollars; that at the time the work was done, he kept a detailed account on his report sheets, which witness thought were in Portland; that he knew that the amounts were correct; that the total amount for the extra job work on the foundry was Four Hundred Eighty-one Dollars and Fourteen cents (\$481.14).

Witness further testified that the next building he erected was the power house; that it had trusses, struts, and gusset plates; that it had two classes of trusses in it, one a main truss; that the building was all knocked down, the same as the other buildings; that there was a lean-to on it which had a truss approximately fifty (50) or sixty (60) feet long, but that truss came as he expected the whole job to come, broken in the center, in two sections,

(Bill of Exceptions—Testimony of Chas. O. Dean.)

riveted up in the shop; but that the other truss was all knocked down, gusset plates loose and pitch angles, four (4) on top, also loose; that he judged there were about thirty (30) pieces in the main truss, and for the truss for the lean-to two (2) main pieces and probably one (1) or two (2) angles to be riveted in the field; that he kept an account of the extra shop work for the steel in the power house and that it cost Two Hundred Seventy-nine Dollars and Thirty-nine cents (\$279.39).

Witness further testified that the next buildings he erected were the ship shed, the boiler and blacksmith shop (one building), and the machine shop; that the steel for these buildings came knocked down; that these buildings contained trusses, struts and gusset plates; that none of the trusses were in two pieces as in the lean-to on the power house; that he kept account of the extra work involved on these buildings, and that the total cost on the machine shop and boiler and blacksmith shop was Five Hundred and Seventy-nine Dollars (\$579.00), and on the ship shed Eighteen Hundred Ninety-six Dollars and Sixteen cents (\$1896.16).

Witness further testified that he also erected the coal storage building; that the steel, all of the trusses, in this building came knocked down, the same as the other buildings; that he kept an accurate account of the extra cost of assembling the steel work for this building, and that it amounted

(Bill of Exceptions—Testimony of Chas. O. Dean.)

to One Hundred Sixty-six Dollars and Ninety-eight cents (\$166.98).

Witness further testified that he erected six buildings in all, of which there was extra assembling in the field, and he completed the last building, the coal storage building, some time in 1914; that he did not remember what month; that when he completed the work for these buildings, he did not start in to do the work of erection of the steel work for the pontoons and dry docks, but tied up the work about the first of September, 1914; that he took an inventory of the amount of equipment he had on hand at that time; that he checked over that material himself on a memorandum; that part of the equipment was valued at its full value, being brand new, and never having been taken out of the case or crates; that the rest of it had been in use; that he valued it at what it was worth at that time, allowing for depreciation and wear and tear; that the total value of the equipment on hand when he was compelled to close down September 1, 1914, was Ten Thousand Six Hundred Eighteen Dollars and Nineteen cents (\$10,618.19).

Witness further testified that he used part of this equipment, about the 4th of November, when he went to work; that he was not able to use the other part until the first of December; that when the pontoons were ready, he put it all in use; that the pontoons were not ready so that he could use all of this equipment until December 1, 1914.

(Bill of Exceptions—Testimony of Chas. O. Dean.)

Witness further testified that he obtained his employees from Vancouver, B. C., because there were no mechanics in Prince Rupert of that class; that he had to use structural iron workers, skilled men; that he had eighteen (18) men there on September 1, 1914; that he had to pay their transportation and traveling time to Vancouver; that some of them were re-employed by plaintiff company on this work when he went back to Prince Rupert; that he kept the cost of the expense of sending these men down to Vancouver and returning them, and that it was Nine Hundred Eighteen (\$918.00) Dollars for eighteen (18) men.

Witness further testified, in answer to questions from the Court, that the riveting is done with pneumatic air hammers, and that the rivets are heated in a forge, good and hot, and put in the hole; that one man holds them in the hole, and one uses a pneumatic air hammer, and that they have a dolly-bar, a piece of steel with a cap on the head of it; that it takes four men for the riveting gang, one man to heat, one man to hold on the rivet, one man to stick in the rivets, and the other man to drive them; that they are all driven hot.

Witness further testified that it was necessary to do extra handling of the steel on account of having only about a quarter of the space he should have had; that this steel was for the dry dock work; that he kept a charge of this amount of Twenty-four

(Bill of Exceptions—Testimony of Chas. O. Dean.)

Hundred and Fifty-nine (\$2459.00) Dollars that was claimed for extra handling of the steel.

Witness was then asked whether he knew what the estimate was upon which the steel was supposed to have been handled, assuming that the yard up there were reasonably free and open and there was a reasonable amount of space. To this question defendant objected on the ground that such estimate was immaterial, and thereupon the Court overruled the objection, and allowed the question, and thereupon defendant duly excepted to the ruling of the Court, which exception was allowed. Thereupon, in answer to the question, witness testified that he estimated it at ninety (90c) cents a ton, providing he had plenty of space.

Witness further testified that he kept an accurate account so that he could tell what the cost of moving the steel was in the yard, under the conditions under which he had to work up there, that he had a memorandum of it and that it was Five Thousand Four Hundred Twenty-nine Dollars and Thirty-two cents (\$5,429.32); that this would be approximately Two Dollars and Twenty-eight cents (\$2.28) a ton.

Witness further testified that he had been in this structural steel work for twenty years, was familiar with what it would ordinarily cost for moving steel about in the yard like that at Prince Rupert, assuming that there was plenty of room.

Witness was then asked whether in his opinion,

(Bill of Exceptions—Testimony of Chas. O. Dean.)

based upon his experience, ninety cents (90c) was a reasonable charge. To this question defendant objected on the ground that it was immaterial, and thereupon the Court overruled the objection, and allowed the question, and thereupon defendant duly excepted to the ruling of the Court, which exception was allowed.

Thereupon witness, in answer to the question, testified that ninety cents (90c) was a very reasonable price, and that there was a profit in it at ninety cents (90c) a ton, provided they had space; that it cost about a dollar thirty-eight (\$1.38) extra per ton to move this steel up there because of the congested condition of the yards; and that that was how he computed the amount of Twenty-four Hundred and Fifty-nine (\$2459.00) Dollars.

Witness further testified that he was familiar with the particular items of work comprised in the item of Four Hundred Dollars and Seventy cents (\$400.70) contained in plaintiff's last cause of action covering extra work done in April, May, June and July.

**(Cross-Examination of Charles O. Dean
for Plaintiff)**

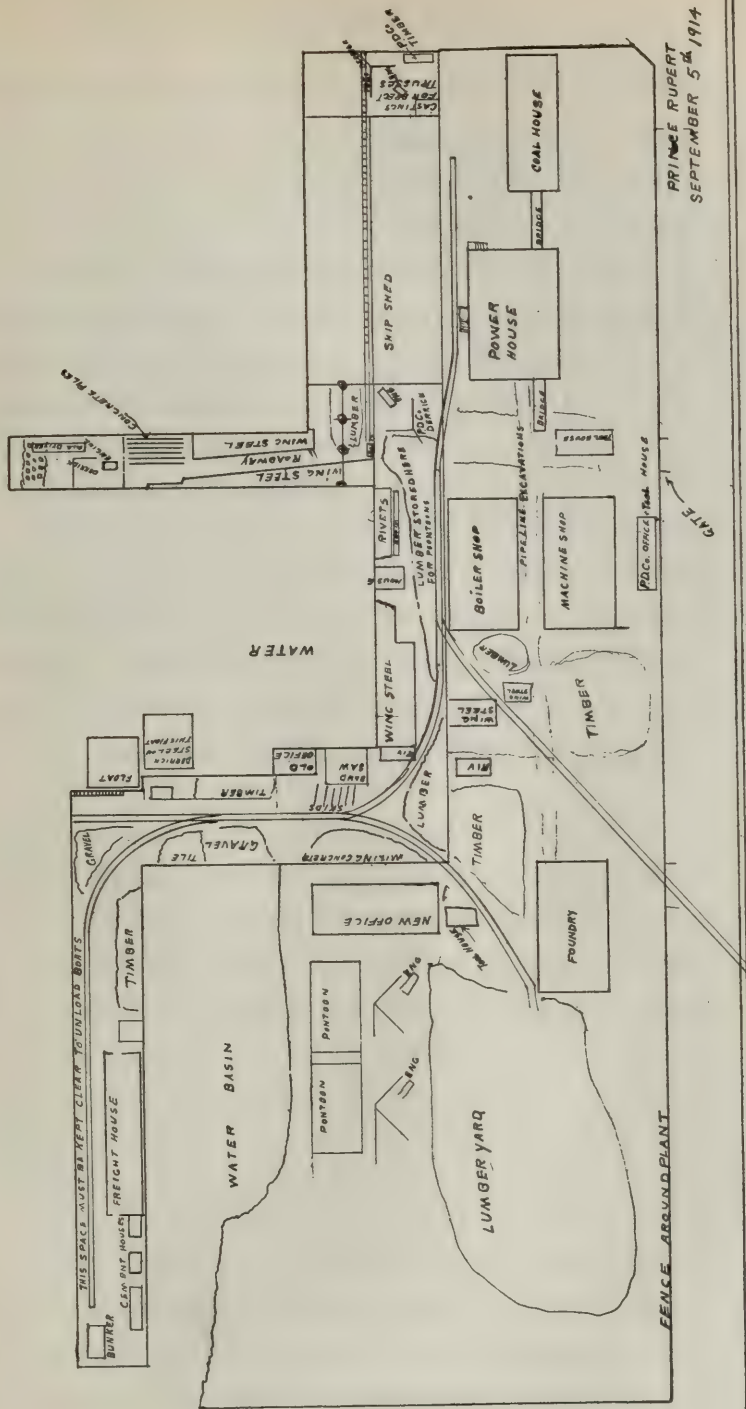
Upon cross-examination, witness testified that he left Portland about the 19th or 20th of November, 1913, and arrived at Prince Rupert about the 23rd; that at that time the ground was not filled in on part of the work and that there was lumber piled

(Bill of Exceptions—Testimony of Chas. O. Dean.)

all over the dock, taking up probably two-thirds of the room where the ship would land; that the whole dock was built, but the decking on it was not completed; that the dock fronted on the water for several hundred feet; that there was only one spot at which the ship could land; that the dock was so crowded that he had to scatter this material in different places, that he could not put it in one place where he could use a derrick for sorting out the material.

Witness thereupon, referring to a tracing which was subsequently offered in evidence by plaintiff and admitted and marked "Plaintiff's Exhibit N,"

WATER



PRINCE RUPERT
SEPTEMBER 5th 1914

(Bill of Exceptions—Testimony of Chas. O. Dean.)

testified that he made that tracing himself on September 5, 1914; that it did not show the condition the dock was in when he went there; that the part of the dock to the left, looking from the shore, was completed, as was also a part of the dock running at right angles thereto; that the part marked "ship shed," to the right looking from the shore, had the piling in but not the decking; that the upright part, running out at right angles to this latter part, was all decked and finished when he went there; that the dock line outside of the ship shed, the launching platform, was completed; that when the witness went there the dock was all completed outside the ship shed, with the exception of the upright part which goes out further into the water.

Witness further testified that the boat arrived a few days after he did; that the next boat came in the following January; that they both landed in the same place; that the third boat came in the following September, bringing dry dock material, but not all of it; that about four hundred and fifty (450) tons of the dry dock material came before, on the second ship; that when the third boat landed, the part of the dock which was all open had not been planked over; that the lines on the tracing show where he unloaded the material for the dry dock; that the space marked as "concrete piling" was all taken up with such piling; that he could not land any material on that dock; that it was

(Bill of Exceptions—Testimony of Chas. O. Dean.)

reserved for the contractor who was putting in the foundation for the pier derrick.

Witness further testified that he did not know who reserved this dock; that he was ordered to keep off of it; that Mr. Steele, of the defendant company, was in Prince Rupert at that time and had taken up with Pillsbury the space he (Mr. Steele) could have for landing this material; that that was the space which Pillsbury gave to Mr. Steele; that witness did not talk with Mr. Pillsbury at all; that the rest of the dock where the ship landed was clear for the plaintiff company; that when the last ship arrived, pontoons were being built on the dock in front of the ship shed and that that space was all filled up with timber; that at that time the ship shed was completed; that a freight house was built on the dock, timber piled up, and a railway track laid, and he could not land that material there unless he had taken it right away; that no material could be strung along that dock at all when the third boat came in, or at any time.

Witness further testified that the clear space he had for landing or storing that material was about forty (40) feet wide by one hundred (100) feet long; that they had another narrow space about thirty (30) feet wide at one end and about one hundred and fifty (150) feet long, tapering down to nothing at the other end, where all they could lay was just one pile of channel, not over a foot

(Bill of Exceptions—Testimony of Chas. O. Dean.)

wide; that the tracing was not drawn to scale but was just a sketch.

Witness further testified that the Grand Trunk Pacific Railway Company or Development Company was building the pontoons; that the timber piled on the dock belonged to the Grand Trunk Pacific; that there was material piled on the dock belonging to the contractor on the superstructure; that the other contractors had nothing to do with witness' contract, or with defendant's contract; that the other contractors were independent contractors under the Grand Trunk Pacific Railway Company or the Development Company.

Witness further testified that the men came three (3) days after he arrived at Prince Rupert; that there was a railroad in there at that time, but not connected through; that the railroad was completed through to Edmonton shortly after he went there; that when they started to unload the boat they notified him that he would have to take the steel from the ship's slings; that he notified Poole, and waited for his orders; that witness saw Pillsbury there upon arriving; that witness had nothing to do with Pillsbury at all; that he got no plans or specifications from Pillsbury; that he got the plans and specifications from the defendant company; that when the job was almost completed, he copied the specifications himself in Pillsbury's office; that he could not get them before that time; that he never got any specifications from defendant company's

(Bill of Exceptions—Testimony of Chas. O. Dean.)

office, that he did the work without any specifications whatever; that he knew there were specifications, but did not get any; that he never saw the specifications until he copied them in Pillsbury's office; that he asked Poole for specifications, but did not ask defendant company for them.

Witness further testified that defendant company had no agent on the ground until about April, 1914; that Mr. Overmire was up there in January, when the second boat came in, but did not stay more than about two days; that witness did not ask Mr. Overmire or Mr. Pillsbury for plans and specifications; that defendant company's representative was Mr. Steele, and that when Mr. Steele arrived, witness was working on the power house, the foundry was not completed, and very little work had been done on the ship shed and the machine shop.

Witness further testified that the trusses in the foundry were small, about thirty-five (35) feet long when assembled, and about eleven (11) or twelve (12) feet deep; that the trusses in the power house were about fifty (50) foot span and about fifteen (15) feet deep assembled; that the trusses in the lean-to to the power house were between fifty (50) and sixty (60) feet long and about eight (8) feet deep at one end, and five (5) at the other; that in the ship shed they had a built-up truss one hundred and eighty (180) feet long, and varying all the way from two (2) feet to about twenty (20) feet deep; that the trusses in the blacksmith and boiler shop

(Bill of Exceptions—Testimony of Chas. O. Dean.)

were the same as those in the foundry, about thirty (30) feet by ten (10) or eleven (11) feet; that the trusses in the machine shop were the same thing exactly; that the trusses in the coal storage plant were about fifty (50) feet long by twelve (12) to fifteen (15) feet deep.

Witness further testified that the extra expense, of which he kept an account, consisted of extra assembling and riveting that should have been done in the shop; that by extra assembling, he meant putting the pieces together; that the trusses came all knocked down, and he had to take and put them together; that then he had to do the riveting; that in this extra expense he included erecting,—riveting and assembling,—all labor, and also liability insurance amounting to ten or fifteen per cent of his pay roll; that the insurance amounted as follows: power house, Nineteen Dollars and Eleven cents (\$19.11), machine shop and boiler and blacksmith shop, Fifty-three Dollars and Thirty-five cents (\$53.35), ship shed, One Hundred Seventy-four Dollars and Seventy-three cents (\$174.73), coal storage building, Fifteen Dollars and Thirty-eight cents (\$15.38), and foundry Forty-four Dollars and Thirty-four cents (\$44.34); that he arrived at those figures by keeping exact time on the men's work; that it took four men in the riveting gang; that he could use two men or four men in assembling; that on part of the work he used six men, taking one derrick gang; that on the rest of the work, he used

(Bill of Exceptions—Testimony of Chas. O. Dean.)

four men for part and only two men for part; that in putting on the gusset plates on the ship shed he would have six men in the gang, four men erecting and two men down below, putting gusset plates on the next piece ready to rivet and go up; that if there were small plates to put on, a one man job, he would put one man on.

Witness further testified that he kept the time, day by day, but did not have it with him, and could not tell the jury how many hours there were; that he paid his men sixty-two and a half cents ($62\frac{1}{2}c$) per hour for mechanics, Five Dollars (\$5.00) a day, and that they were all mechanics.

Witness further testified that of his equipment, two yoke riveters were brand new, one compressor riveter brand new, three air hoists were brand new, three oil forges were brand new, and that that was practically all that was new; that he did not use these yoke riveters on the rest of the work, but had to get new riveters for the dry dock work, because of those being plate work; that the oil forges were all especially for the dry dock work, and were not used on the other work at all; that the air hoists were not used on the other work at all; that he made a discount on the rest of the equipment, allowing as much as twenty-five (25%) per cent depreciation on some of it and valued the stuff at what he considered it worth at that time; that his list of equipment was made on July 5, 1915, from another list that he had; that at that time the

(Bill of Exceptions—Testimony of Chas. O. Dean.)

dry dock was not finished; that it was commenced by July 5th, but was not finished until about the first of September; that it was only completed in July, there being about six or seven weeks more of work on it; that the prices put on the equipment were copied from witness' memorandum when he left in 1914 when he tied up the job; that the list was made for plaintiff company's own benefit, an inventory of the tools.

Witness further testified that the men which he took down to Vancouver and brought back went down on the boat; that the fare was Eighteen Dollars (\$18.00) per man each way; that he had to pay these men traveling time from leaving Vancouver until arriving on the job, and from leaving the job until arriving at Vancouver; that some boats did not make the same time as others; that the men did not all go down on the same boat; that he had to pay their traveling time and expenses whether they did or not; that some of them took different lines of boat; that witness did not know what was the time of the several boats from Prince Rupert to Vancouver, but that it amounted to Twenty-five Dollars and Fifty cents (\$25.50) each way per man; that the time was a day and a half at Five Dollars (\$5.00) per day for each man each way; that when he tied up about the first of September, 1914, all the work was finished but the dry dock; that at times he had as many as sixty men on the job, maybe sixty-five; that he had to send to Vancouver for all me-

(Bill of Exceptions—Testimony of Chas. O. Dean.)

chanics; that the men whom he sent back were fit to work on the dry dock.

Witness further testified that he resumed work about the 4th of November, working about ten days on the pier derrick before resuming work on the dry dock; that this pier derrick was not used for the dry dock, but was permanent, and was located at the end of the pier where they had to leave the decking open to drive the concrete piling; that the work on that derrick was part of his contract with the defendant company; that he did not know who furnished the steel for it; that it came in a separate shipment from any of the rest of the material; that he did not know how it was arranged in the contract, but he got orders from Poole to put the derrick up; that he did not know whether it was included in the original contract or not.

Witness further testified that he got the order from Poole to put up this derrick before September 1, 1914; that he could have used the men that he brought back to Vancouver for putting up this derrick, but like the pontoons, it was not ready, so he had to send the men back; that no new men were brought up for the purpose of doing this work; that the men he brought up from Vancouver were brought up for the dry dock work; that some of them worked on the derrick; that some men he hired in Prince Rupert worked on the derrick.

Witness further testified that he started this work on the dry dock about the first of December;

(Bill of Exceptions—Testimony of Chas. O. Dean.)

that he started to work on the pontoons before the first of December, but started to assemble the steel and rivet it together about the first of December; that he was on the pontoons as soon as they were launched, about the middle of November; that the first pontoon was launched in August, and the second between August and September; that he was there when the first one was launched; but not when the second one was launched; that altogether there were twelve pontoons on the dry dock; that he did not know whether the Grand Trunk Pacific Railway or the Development Company furnished the pontoons; that the defendant company furnished the pontoons for the plaintiff company; that nobody was up there representing the defendant company continually; that Mr. Steele was up there, but did not give the pontoons to the witness; that the pontoons were tied up at the wharf, and that he went out and put the steel on them; that Poole notified him when the pontoon was ready to go to work on it; that when witness arrived, the Grand Trunk was building the pontoons; that, as they built them, they tied them up at the wharf where witness wanted them, and he erected the steel on them.

Witness further testified that he kept an accurate account of the expense of transferring the steel for the dry dock; that he had a big pile of plates and, if he wanted a plate out of it, he would have to dig down and get it out; when he laid the other stuff out, instead of sorting it, he had to pile it up;

(Bill of Exceptions—Testimony of Chas. O. Dean.)

if he had had sufficient space when he started in, he could have sorted it out and laid it in different places; that as it was, he had to keep piling it over and piling it over; that Mr. Steele, of the defendant company, put it where it was; that witness had to make room to store the steel; that Mr. Steele had room enough to pile it up and store it; that witness took it from where it was stored.

Witness further testified that what he was charging for in this case was for taking the steel from where it was stored, sorting it and taking it to the dry dock; that the charge was only for sorting the dry dock steel, not for carrying it from where it was to the dry dock; that he expected the steel to be unloaded where it was when he commenced to sort it; that there is no difference between sorting and handling; that the charge was just one charge for the same thing.

Witness further testified that the steel was too heavy to pick up by hand; that it took six men and a derrick on that work; that if it was light stuff, one or two men could handle it, depending upon the size of the piece.

Witness further testified that the item of Four Hundred Dollars and seventy cents (\$400.70) was for extra work on the dry dock wings, extensions to them; that it was done in April, May, June and July; that at that time Mr. Fey was up there representing defendant company; that Mr. Fey ordered him to do the work, telling him to go ahead and do

(Bill of Exceptions—Testimony of Chas. O. Dean.)

it, and that it would be paid for in the usual way the same as the rest of the work; that Mr. Fey did not tell the witness that Pillsbury ordered the work to be done; that witness was on the job, could see the mistake that had been made, and knew that the work had to be done; that this work was not covered by plaintiff's contract; that he did the work for Mr. Fey, and did not know what orders Mr. Fey got from Pillsbury.

Witness further testified that when the first part of this extra work, the first section, was started, Mr. Fey was not up there at all; that the biggest part of these items were ordered by Mr. Fey; that witness could pick out what was not ordered by him; that the change in the compressor foundation on section one, amounting to Fifty-seven Dollars and sixty cents (\$57.60), was made under Mr. Pillsbury's orders and not under Mr. Fey's; that the orders for the plate frames, witness got from Mr. Fey; that witness had no plans or specifications for this work.

Thereupon the plaintiff, to sustain the issues upon its part, called as a witness one CHARLES McGONIGLE, who was duly sworn and testified as follows:

**(Direct Examination of Charles McGonigle
for Plaintiff)**

Witness testified that he was Secretary of the Poole-Dean Company; that he was not connected with the plaintiff company in September, 1912; that he has been in the structural steel business for about fifteen years, as draftsman and in the field, employed by Cambria Steel Company, Johnstown, Pennsylvania, Garry Iron & Steel Company, Cleveland, Ohio, and by American Bridge Company, which is now called the United States Steel Products Company, in their New York or Brooklyn office, and by Milliken Bros.; that he is familiar with steel as it is shipped by rail and by boat, especially steel trusses, struts and gusset plates.

Witness further testified that it is economical and customary to do all the fabricating that can possibly be done in the shop; that their equipment is better and labor more permanent, and that all the fabricating that can be done and can be shipped is done in the shop, that is all the assembling and riveting; that he had never seen any difference in shipping by water and by rail; that Milliken Bros. have their plant on tide water, in New York, and ship steel to the Pacific Coast through San Francisco, Portland and Seattle, and that their custom was the same as other customs, shipping either by rail or by water.

Witness further testified that he had heard the testimony of Poole and Dean as to how these trusses came by water to Prince Rupert and would not say

(Bill of Exceptions—Testimony of C. McGonigle.)

from that testimony that they came up there by boat in the customary manner.

Witness testified, referring to Plaintiff's Exhibit "B," that it would be customary to ship that part of the truss shown in four pieces, that is, from the peak point to the column connection and down to the third point in the lower chords would be shipped in one piece, then a small loose angle would generally be shipped loose, then on the opposite side of the truss, the other member would be riveted practically the same way, except that the peak plate would go on one side, not on both; that a gusset plate was usually referred to as any small plate connecting two pieces of steel, but a peak plate was a rather important gusset plate; that said Exhibit "B" showed the peak plate loose; that it is customary to ship the peak plate to either one side or the other of the truss, the truss being divided in the middle; that according to the drawing, the peak plate would have to be driven and riveted in the field; that, according to the drawing, the truss came in about twenty (20) to twenty-two (22) pieces, that is, the whole truss from column to column; that if the whole truss came in the customary manner, it would be in four (4) pieces; that it would be possible to ship that truss in the customary manner, in four pieces.

Witness testified, referring to Plaintiff's Exhibit "C," that the drawing showed struts; that so far as witness could see, that strut was all in one (1) piece; that there was a gusset plate on one end of

(Bill of Exceptions—Testimony of C. McGonigle.)

the strut riveted to the strut, in the customary manner; that the length of the strut was twenty (20) feet, not counting the plate; that the dimensions seemed to be fifty-eight (58) inches in one direction and eight (8) feet five (5) in the other; that the length of the truss shown on Plaintiff's Exhibit "B," if it came in the customary way would be about twenty-nine (29) feet with the gusset plate, and the depth of it over all would be about eight (8) feet, and thirteen (13) from the peak to the lower chord.

Witness further testified, referring to Plaintiff's Exhibit "D," that the drawing showed bottom chords; that the drawing showed a gusset plate, marked "M," to be shipped loose, also some angles; that it is generally customary, under similar circumstances, to ship gusset plates and angles loose like that.

Thereupon the witness begged pardon, and further testified that it is generally customary to rivet gusset plates and angles on wherever rivets can be riveted in; that this member was approximately forty-one (41) feet long by four feet (4) wide with the gusset plate riveted on; that he thought it would be customary to have the gusset plate and the angle irons riveted on.

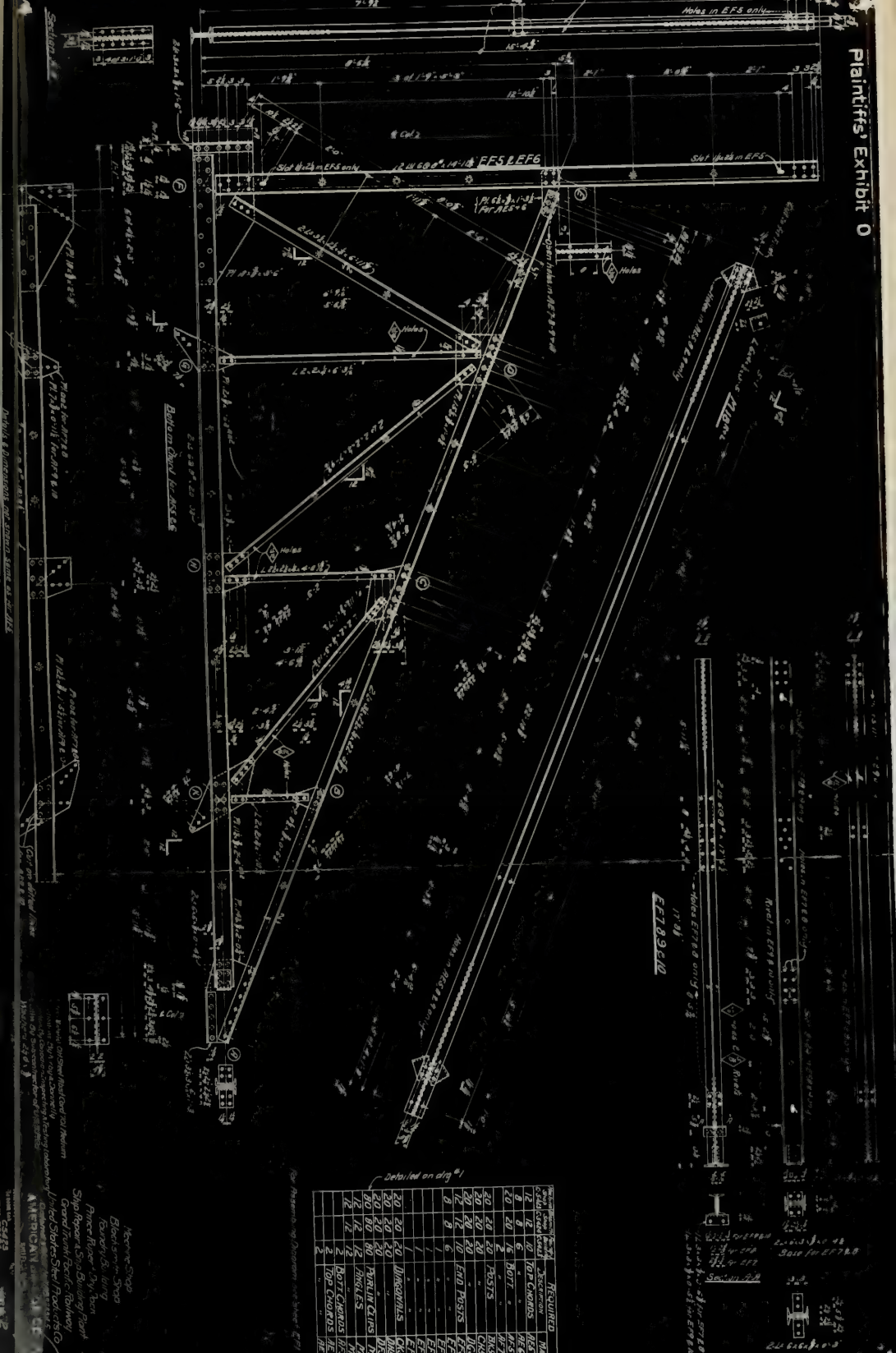
Witness further testified, referring to Plaintiff's Exhibit "E," that it showed a strut for a ship shed; that a strut was rather a general name; that the drawing probably showed a crane runway column;

(Bill of Exceptions—Testimony of C. McGonigle.)

that the drawing showed that the column was shipped knocked down; that customarily that piece could be shipped riveted up; that that piece was a little over thirty (30) feet long without the gusset plates and seven (7) feet ten and one-eighth ($10\frac{1}{8}$) inches wide; that the gusset plate, shown in the upper right hand corner of the drawing, connected the two parts of this strut together; that the drawing showed this gusset plate to come loose; that sometimes a gusset plate like that might come loose; that the gusset plates were riveted on the bottom chord and on the top chord when the column came out; that the web members came loose.

Witness further testified, referring to Plaintiff's Exhibit "F," that the drawing showed the top section of a crane run column; that the drawing showed it to be riveted up complete with all the gusset plates and angle irons on; that the column was over thirty-nine (39) feet long and five (5) feet wide; that it belonged to the ship shed; that the ship shed contained nine (9) or ten (10) of these columns, eight (8) of them anyway, and that eight (8) top sections came assembled, and the bottom sections of what looked like the same thing came knocked down.

Thereupon plaintiff offered in evidence a drawing, which had been attached to a deposition subsequently to be read, which drawing was admitted in evidence and marked "Plaintiff's Exhibit O."



Detailed on drug #1

2007-2008		2008-2009		2009-2010		2010-2011		2011-2012		2012-2013		2013-2014		2014-2015		2015-2016		2016-2017		2017-2018		2018-2019		2019-2020		2020-2021		2021-2022		2022-2023		2023-2024		2024-2025		2025-2026		2026-2027		2027-2028		2028-2029		2029-2030		2030-2031		2031-2032		2032-2033		2033-2034		2034-2035		2035-2036		2036-2037		2037-2038		2038-2039		2039-2040		2040-2041		2041-2042		2042-2043		2043-2044		2044-2045		2045-2046		2046-2047		2047-2048		2048-2049		2049-2050		2050-2051		2051-2052		2052-2053		2053-2054		2054-2055		2055-2056		2056-2057		2057-2058		2058-2059		2059-2060		2060-2061		2061-2062		2062-2063		2063-2064		2064-2065		2065-2066		2066-2067		2067-2068		2068-2069		2069-2070		2070-2071		2071-2072		2072-2073		2073-2074		2074-2075		2075-2076		2076-2077		2077-2078		2078-2079		2079-2080		2080-2081		2081-2082		2082-2083		2083-2084		2084-2085		2085-2086		2086-2087		2087-2088		2088-2089		2089-2090		2090-2091		2091-2092		2092-2093		2093-2094		2094-2095		2095-2096		2096-2097		2097-2098		2098-2099		2099-2100		2100-2101		2101-2102		2102-2103		2103-2104		2104-2105		2105-2106		2106-2107		2107-2108		2108-2109		2109-2110		2110-2111		2111-2112		2112-2113		2113-2114		2114-2115		2115-2116		2116-2117		2117-2118		2118-2119		2119-2120		2120-2121		2121-2122		2122-2123		2123-2124		2124-2125		2125-2126		2126-2127		2127-2128		2128-2129		2129-2130		2130-2131		2131-2132		2132-2133		2133-2134		2134-2135		2135-2136		2136-2137		2137-2138		2138-2139		2139-2140		2140-2141		2141-2142		2142-2143		2143-2144		2144-2145		2145-2146		2146-2147		2147-2148		2148-2149		2149-2150		2150-2151		2151-2152		2152-2153		2153-2154		2154-2155		2155-2156		2156-2157		2157-2158		2158-2159		2159-2160		2160-2161		2161-2162		2162-2163		2163-2164		2164-2165		2165-2166		2166-2167		2167-2168		2168-2169		2169-2170		2170-2171		2171-2172		2172-2173		2173-2174		2174-2175		2175-2176		2176-2177		2177-2178		2178-2179		2179-2180		2180-2181		2181-2182		2182-2183		2183-2184		2184-2185		2185-2186		2186-2187		2187-2188		2188-2189		2189-2190		2190-2191		2191-2192		2192-2193		2193-2194		2194-2195		2195-2196		2196-2197		2197-2198		2198-2199		2199-2200		2200-2201		2201-2202		2202-2203		2203-2204		2204-2205		2205-2206		2206-2207		2207-2208		2208-2209		2209-2210		2210-2211		2211-2212		2212-2213		2213-2214		2214-2215		2215-2216		2216-2217		2217-2218		2218-2219		2219-2220		2220-2221		2221-2222		2222-2223		2223-2224		2224-2225		2225-2226		2226-2227		2227-2228		2228-2229		2229-2230		2230-2231		2231-2232		2232-2233		2233-2234																																																					
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Meerkat Shop

near 4.5m/s. Building

Adirunk Pacific Pa-

Shares 312,111,000

AMERICAN

55/23

(Bill of Exceptions—Testimony of C. McGonigle.)

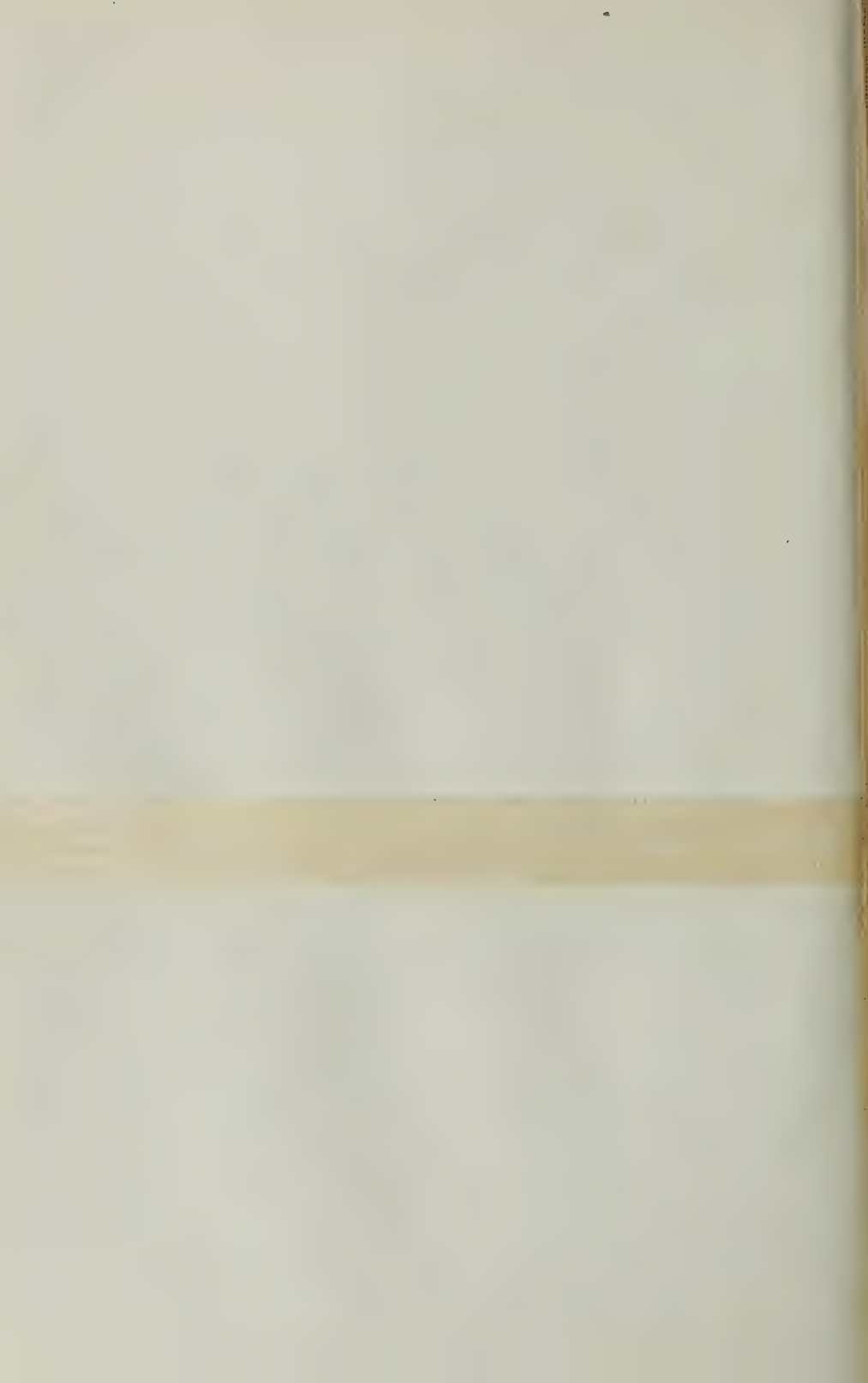
Thereupon witness stated, referring to Plaintiff's Exhibit "O," that it showed a drawing of the trusses for the machine shop, blacksmith shop and foundry building; that it looked like a lean-to truss; that the drawing showed that it was knocked down, in nine (9) main pieces as a general thing; that if it had been fabricated as is customary, there should be two (2) pieces; that the vertical member, marked "EF-5—EF-6," would come loose customarily, and that the rest of it would be riveted up in one piece; that one piece would be approximately eight (8) feet nine (9) high by twenty-two (22) feet six and a half ($6\frac{1}{2}$) long, without considering the vertical member; that the vertical member would come loose, and the rest of it would be riveted together ordinarily; that "EF-5" and "EF-6" would come loose, and the rest of it would be in one (1) piece; that in the foundry building, there were twenty (20) such trusses; that it appeared that the machine shop, blacksmith shop and foundry building were exactly on the same general dimensions, and that each one would contain twenty (20) lean-to trusses; that the main trusses on the power house, as shown on Plaintiff's Exhibit "B," were fifty-two (52) feet in extreme length; that the trusses in the other buildings,—machine shop, blacksmith and boiler shop,—were smaller; that the general plan showed that these latter trusses were approximately thirty-six (36) feet in extreme length; that the over-all dimensions on the ship shed were one hundred fifty-nine

(Bill of Exceptions—Testimony of C. McGonigle.)

(159) feet six (6) inches by three hundred (300) feet; that there were no lean-tos on the ship shed; that the ship shed had a cantilever arm sticking out over the dock.

Thereupon plaintiff offered in evidence a drawing, which had been attached to a deposition subsequently to be read, which drawing was admitted in evidence and marked "Plaintiff's Exhibit P."

[illegible][illegible]





(Bill of Exceptions—Testimony of C. McGonigle.)

Thereupon witness testified, referring to Plaintiff's Exhibit "P," that it showed another of the main trusses to the machine shop, blacksmith shop and foundry; that it showed the truss to be shipped knocked down in about twenty-one (21) pieces; that customarily it would be shipped in four (4) pieces, of which the larger two (2) pieces would be approximately twenty-two (22) feet long by about five (5) feet deep; that the customary size of the steel shown on Plaintiff's Exhibit "P" would be about twenty (20) by five (5) feet, and that the dimensions of the upper part of the crane column, shown on Plaintiff's Exhibit "F," were five (5) feet by thirty-nine (39) feet.

Witness further testified that in his business as contractor, he had had occasion to examine plans and make estimates on the cost of steel erection; that customarily he had not used the specifications in making those figures; that the plans generally show what work is required; that aside from painting, it is understood that work has to be riveted satisfactorily; that in constructing steel work, the main thing is to have the rivets well driven and tight, and in dry dock work the rivets must be water tight and very often have to be caulked afterwards.

Thereupon plaintiff offered in evidence a drawing, which had been attached to a deposition subsequently to be read, which drawing was admitted in evidence and marked "Plaintiff's Exhibit Q."

(Bill of Exceptions—Testimony of C. McGonigle.)

Thereupon witness testified, referring to Plaintiff's Exhibit "Q," that it showed a drawing of the power house trusses; that it might be either a lean-to truss or a main truss; that the drawing showed the truss to have been completely fabricated in the shop; that the truss was made up of two (2) pieces, one (1) piece twenty-two (22) feet long by six (6) feet six (6) deep, and the other about twenty-two (22) feet long; that the entire length of the trusses would be about forty-nine (49) feet; that the other section of the truss was longer but shallower; that the truss would be considered a lean-to truss.

Thereupon plaintiff offered in evidence a drawing, which was identified by the witness, received in evidence and marked "Plaintiff's Exhibit R."



POWER HOUSE
Ship Repair & Shipbuilding Plant
Grand Trunk Pacific Railway.



(Bill of Exceptions—Testimony of C. McGonigle.)

Thereupon witness testified, referring to Plaintiff's Exhibit "R," that it was an erection diagram of the power house, showing the number of trusses and how it should be erected.

**(Cross Examination of Charles McGonigle
for Plaintiff)**

Upon cross examination, witness further testified that he was financially interested in plaintiff company; that he had been connected with the Cambria Steel Company as structural draftsman in the office for the shops; that he had been connected with the American Bridge Company as draftsman and checker of drawings, making shop details and general plans; that he had been connected with the Garry Iron & Steel Company in a similar capacity, and with Milliken Bros. in the detail department in the office, making similar plans, also designing small structures similar to these, and office buildings, then in the contracting department, in New York, San Francisco and Portland; that since he had left Milliken Bros. he had been contracting on his own responsibility with the plaintiff company and also for himself.

Witness further testified that he had not had any contracts exactly similar to the contract involved in this case, but had had contracting in structural steel work, for example, the umbrella sheds for the Northern Pacific Terminal Company in Portland, for some steel on the Pittock Building, and on

(Bill of Exceptions—Testimony of C. McGonigle.)

the Telephone Building; that, as contracting agent for Milliken Bros., he was assistant to the contracting engineer in San Francisco, and in Portland was in charge of the office.

Witness further testified that the steel which he handled for Milliken Bros. was generally shipped by water, sometimes over the American-Hawaiian Steamship Company and sometimes over other lines; that the vessels in which the steel came varied in size; that the American-Hawaiian Steamship Company used to ship their steel across the Isthmus; that before they stopped shipping to Portland, they were shipping by the Panama Canal; that sometimes they shipped around the Horn, but that witness could not remember receiving any steel brought around the Horn on ships.

Witness further testified that most of these trusses would be stowed in the hold, through the hatchway; that he could not say off hand, without making a diagram, how long the hatchway would have to be in order to take the largest of these trusses; that generally when steel is lowered into the hold of a ship, one end is lowered down then pulled in, so that sometimes they can get a large piece in, larger than the hatchway would show.

Witness further testified that he did not know whether nearly all of these ships had two decks or not; that he did not know whether they had an amidships deck; that he could not say whether an amidships deck would interfere with loading; that

(Bill of Exceptions—Testimony of C. McGonigle.)

he did not know how deep these ships would have to be to take this steel all assembled and riveted together, but that to his knowledge there had never been any question about pieces of that size.

Witness further testified, that the trusses which came riveted together were different from the trusses which came knocked down, in that the latter had peaks, whereas the former had not; that whether or not a peak truss was less strong than a truss without a peak depended to a great extent upon the depth of the truss; that a peak truss would be loaded on a car with the top chord, that is the longest side down, just different from the way it would stand in the building; that he thought a five foot deep truss could be put on a car lying down flat; that he thought another similar truss could be safely put on top of it; that he thought there would be no danger of its buckling as long as it was not loaded too heavily; that if a load were put on the center of one of those pieces, it would probably buckle it; that he did not think there would be any danger of that, if it were loaded in a ship.

Witness further testified that he did not know that there was a movement of cargo on a ship; that he did not know that bulk grain cannot be shipped around the Horn, because it shifts, that he never heard that; that he supposed that if all this steel were to be shipped in one vessel of a capacity of perhaps five thousand tons, it would be put into the hold; that he did not know that, when these trusses

(Bill of Exceptions—Testimony of C. McGonigle.)

are to be shipped by water, provision is always made for carrying them on deck; that he had had steel come into Portland by boat; that practically all of the steel for Milliken Bros. came to the Pacific Coast by boat, and steel for the County Court House, Lincoln High School and the Oregon Hotel came by boat; that he did not remember whether that steel which came by boat was a complete cargo or not, that he supposed they had a general cargo with it; that he did not know whether, if there were a general cargo along with the steel, it could be stowed so as to protect the steel, but that it sounded reasonable; that he did not know what would be done to protect a cargo altogether of steel, but supposed it could be done carefully.

Witness further testified that the only steel which he ever had in Portland coming by water came from Milliken Bros., whose plant is on the seaboard; that Milliken Bros. generally lighter the steel to the American-Hawaiian dock, as their plant only had about eight feet of water; that he did not know who loaded the steel for Milliken Bros. on the ships, or whether they furnished experienced men who understand how to handle steel; that he did not know how many of these trusses could be stowed in the hold of a ship of five thousand tons; that it all depended upon the weight of the trusses, but that he could not judge such weight; that he did not know whether these trusses could be carried cross-wise of the boat, but supposed it would depend upon

(Bill of Exceptions—Testimony of C. McGonigle.)

the width of the boat, although he did not know; that he did not know what an amidships deck was; that he had been in the ships often and supposed they were liable to have several decks; that he did not know what a 'tween deck was; that he knew that Milliken Bros. shipped steel into Portland by water, trusses as large as these, but he never paid any attention to where they stowed them on the boat; that he thought they were below deck.

Witness further testified, referring to plaintiff's Exhibit "D", that the gusset plate shown thereon was shipped loose; that it also showed at least two (2) small angles also shipped loose; that he did not say anything in his former testimony about the angles, but said that the gusset plate can be riveted up; that he could not tell whether the angle should be riveted up or should come loose; that he could not tell whether the angles ought to be riveted on or not; that it might be more convenient for erection to have that angle loose, that sometimes having an angle loose facilitates erection; that the steel shown on Plaintiff's Exhibit "D", including two small angles, large gusset plates, the main member, and the two small gusset plates, should come in six (6) pieces; that in his former testimony he meant that the large gusset plate should have been riveted to the main body of the strut; that he could not say whether the two small gusset plates should have been riveted on; that it looked to him as if the small angle could be riveted on to facilitate

(Bill of Exceptions—Testimony of C. McGonigle.)

erection, although sometimes a small angle like that is left off for the same purpose, to facilitate erection; that the other gusset plate might have been riveted on or could have been loose for shipment; that there was nothing in the drawing to show why the angle was not riveted on; that his impression was that the gusset plate was shipped loose to save riveting in the shop; that he could not see any reason why it was not riveted; that the diagram (Plaintiff's Exhibit "D") did not show any reason why the gusset plate was not riveted.

Witness further testified that he had never had anything to do with shipping steel to foreign countries; that he remembered seeing some of the plans of Milliken Bros. for foreign shipment, but did not remember having a great deal to do with them; that such plans were in the office and that he knew what was going on, but that he never had anything to do with preparing steel for dry docks; that from his experience he knew what dry dock materials should be like; that dry dock work is simply plate work that must be water tight; that he had never had anything to do with actual dry dock work, but he had done work of a similar nature.

Witness further testified that he never paid any attention to the restrictions made by ships upon the loads they take; that he never paid any attention whether the steel was coming by water or by rail; that he had a general idea that there was some arrangement by which ships charged for space if

(Bill of Exceptions—Testimony of C. McGonigle.)

the stuff takes more space than weight, but was not sure what it was; that he did not know in loading a ship they have to have some experienced man to tell where everything should be stowed.

Thereupon the plaintiff, to sustain the issues upon its part, called as a witness one SAMUEL HOLMES, who was duly sworn and testified as follows:

**(Direct Examination of Samuel Holmes
for Plaintiff)**

Witness testified that he lived at 1144 East Yamhill Street, Portland, Oregon, and was a structural steel worker connected with the Northwest Steel Company just now; that he had been in structural steel work for about thirty years, with the Hay Foundry Works, New Jersey, the Pacific Roller Mill Company, Patterson, New Jersey, the Payne Bros. Company, Newark, New Jersey, Robert W. Hunt & Company, New York City, and the Northwest Steel Company; that in his business with these different concerns he had checked up material for ocean shipment to foreign countries; that the condition in which steel is shipped by boat to foreign countries or to the Pacific Coast here, in reference to its being fabricated, depends upon the specifications, what the parties agree to the shipment of, how it should be shipped; that the question was,

(Bill of Exceptions—Testimony of Samuel Holmes.)

where the steel had to go, close in to the port of discharge or to the interior; that if there was nothing in the specifications with reference to the manner of shipping, it took the usual course. Witness further testified that steel usually comes in the ordinary way as a knocked down shipment; that how much of it would be knocked down depends on the design of the material.

Witness further testified, referring to Plaintiff's Exhibit "B", that the drawing showed that particular truss to be knocked down; that from his experience he would say that if the destination of that steel were not far from port, it ought to be riveted together; that, according to the drawing, this steel came in a lot of pieces; that customarily it would come in four (4) pieces; that from the drawing the truss looks to be in about twenty-two (22) pieces.

Witness further testified, referring to Plaintiff's Exhibit "C", that the gusset plate thereon shown was riveted to the steel.

Witness thereupon testified, referring to Plaintiff's Exhibit "B", that the largest of the four (4) pieces in which it could be shipped as customary would be about twenty-eight (28) feet long and a little more than six (6) feet deep.

Witness thereupon testified, referring to Plaintiff's Exhibit "D", that it showed the gusset plate to be loose; that that gusset plate should be riveted on; that he did not know what the connections

(Bill of Exceptions—Testimony of Samuel Holmes.)

were, but that it appeared from the drawing that the gusset plate could be riveted on; that if the gusset plate were riveted on, the dimensions of that piece of steel would be about thirty (30) feet long by five-eighths ($\frac{5}{8}$), by seven (7) feet three (3) deep; that it would be customary to ship the gusset plate riveted on, but that he did not know the manner of erection and it might have to be sent loose for different purposes; that, looking at it the way it was, if they could get the other member in by riveting that, it should be riveted; that it is not the custom to leave all the riveting that can possibly be done to be done in the field; that the custom is to do as much riveting in the shop as possible.

Witness further testified, referring to Plaintiff's Exhibit "E", that the strut for the crane in the ship shed thereon shown came knocked down; that the strut was twenty-nine (29) feet long by seven (7) feet deep; that from his experience and taking into consideration the dimensions of the strut, it was cheaper to have a strut of that kind come riveted up rather than knocked down, and customary in the fabricating part of it, but that he did not know about the shipping part; that if nothing were said about it, that strut would be expected to come together intact.

Witness further testified, referring to Plaintiff's Exhibit "F", that it showed a strut for the ship shed completely fabricated, about thirty-seven (37)

(Bill of Exceptions—Testimony of Samuel Holmes.)
feet long by five (5) feet deep; that they send out struts riveted up in that way.

Witness testified, referring to Plaintiff's Exhibit "O", that it showed a lean-to truss knocked down, about twenty-two (22) feet long by eight (8) feet leep; that the vertical member would, under customary conditions, be taken off for shipment; that under customary conditions that truss would be shipped in two (2) pieces; that the drawing showed that it was shipped in nine (9) pieces.

Witness further testified, referring to Plaintiff's Exhibit "P", that it showed a truss knocked down, about seventeen (17) or eighteen (18) feet long by seven (7) feet deep, in about eleven (11) or twelve (12) pieces for half the truss, about twenty-two (22) or twenty-four (24) pieces for the whole truss; that a truss of that dimension ought to come in two (2) or three (3) pieces.

Witness further testified, referring to Plaintiff's Exhibit "Q", that it showed a truss on the power house lean-to fabricated, but broken in two (2) sections; that whether or not it was fabricated in the customary manner depends upon where it was going, that it could be shipped in two (2) pieces or one (1) piece; that the over-all dimension was about fifty (50) feet long for the whole truss and about six (6) feet deep, a little narrower at the other end.

Witness further testified that in his business he had inspected steel for shipment to foreign coun-

(Bill of Exceptions—Testimony of Samuel Holmes.)

tries; that that steel was not in the condition shown by these drawings; that it was more of the bridge work, while this was building work; that gusset plates are riveted to the members, part riveted on, the other part left for the next member; that sometimes some of the gusset plates cannot be sent on, that it just depends upon the design; that sometimes gusset plates are sent bundled up, according to the design.

Witness further testified that, from his examination of the drawings, it would be generally customary to ship those gusset plates riveted on, but, as he said before, sometimes one cannot tell just by looking at the detail drawings; that sometimes these gusset plates are left off for convenience to the erector; sometimes there might be other members going in and they cannot get them in without taking the gusset plate off, and at other times, the gusset plates are riveted on; that mostly nine times out of ten part of the gusset plates are riveted on in the shop.

Witness further testified that trusses, such as he had stated should come customarily fabricated, could be loaded in a boat if the steamship would carry them; that he had seen bridge work loaded in steamers; that he had not seen pieces of steel work as wide as these loaded into boats, because that class of work does not come in bridge work except in portals, and then the work would be about that wide but not as long; that those portals

(Bill of Exceptions—Testimony of Samuel Holmes.)

could be called struts, portal struts, but that they were generally called portals.

Witness further testified that he had taken several contracts for erecting structural steel himself; that erecting and riveting were the same thing; that the only thing he would look at the specifications for, would be that sometimes they call for painting; that erecting work is pretty nearly the same all over,—to erect the steel satisfactorily to the customer, whoever you are doing it for; that a little while ago he took a job by letter and did not see the specifications at all.

**(Cross Examination of Samuel Holmes
for Plaintiff)**

Upon cross-examination, the witness testified that he had been working for the Northwest Steel Company about seven and a half years all told, but had been away from them about two years; that the 29th of the previous month they had sent for him to come back; that before that, he was down at Willapa Harbor, putting up a bridge for the Cowlitz Bridge Company; that before that he was in business for himself in Portland, ever since he had left the Northwest Steel Company about two years ago; that the Northwest Steel Company do not make any ocean shipments; that they ship entirely by rail, except on the river steamers; that if this kind of stuff was shipped on river steamers, it would have to be put on deck. Witness further

(Bill of Exceptions—Testimony of Samuel Holmes.)

testified that before he came out to this coast, his experience had all been in or around New Jersey and New York, superintending plants located on the seaboard; that the stevedores loaded the vessels; that these stevedores were not employed by the plant.

Witness further testified that never in his experience had he shipped a full cargo of steel; that he had never seen a ship loaded with a full cargo of steel, but that he had seen a full cargo of plain material, that is not fabricated, as this steel is all fabricated; that he had never seen a vessel completely loaded with fabricated material; that in his judgment it would be possible to load a ship altogether with fabricated material; that he would put these trusses in the ship's hold, taking them down the hatchway. Witness further testified that his experience on export shipping had been chiefly with bridge material, and that the steel he had seen loaded on vessels had been bridge steel; that at one time he had seen a little bit of building material of this character go to Europe.

Witness further testified that he did not know very much about the ships' regulations in regard to loading, but that he had seen a lot of steel loaded; that how the trusses would be put in the ship, depended on the decks and the deck room; that whether the trusses would be laid down or stood up, depended on the deck; that he might stand them up on end and pack them up on each side of the

(Bill of Exceptions—Testimony of Samuel Holmes.)

hold until the hatch was full, or, if there was plenty of room, lay them down; that these trusses would be laid down, one on top of the other, without injuring them; that they would not be liable to buckle or be injured while in the ship, the chances of buckling were when they were coming out, not so much when going in as when coming out; that he was speaking now of any kind of steel. Witness further testified that if the trusses were not upright but were all tilted at one angle, it would have no effect at all, but that there must be some packing or blocking to hold them up; that if they were put in the ship's hold, one truss would be set up beside the side of the vessel, the next one against it, that they would be jammed in until they worked up to the center, and then they would be keyed in, the same as putting a keystone in; that a ship's hold could be loaded that way. Witness further testified that he was not a sailor; that he did not see why the ship would be absolutely rigid and would not give; that the fact that there would be no way for the ship to give, would not make any difference to the ship.

Witness further testified, referring to Plaintiff's Exhibit "D", that it was another gusset shown thereon, not riveted; that the drawing showed an angle, not riveted; that he did not know why they were not riveted; that he did not see anything on the drawing which would show why the other gusset plate and the angle were not riveted on.

(Bill of Exceptions—Testimony of J. H. McGregor.)

Thereupon the plaintiff, to sustain the issues upon its part, called as a witness one JOHN HAROLD MCGREGOR, who was duly sworn and testified as follows:

**(Direct Examination of John Harold
McGregor for Plaintiff)**

Witness testified that he lived in Portland; that he was an inspecting engineer for Hildreth & Company of New York, at the present time inspecting Alaskan railroad material for the government, and the structural steel in the Auditorium; that he had been engaged in inspection work of steel for about eleven years, four years chief draftsman and superintendent for the Middletown Car Works at Middletown, Pennsylvania, for four or five years chief engineer for the Central Inspection Bureau, No. 17 State Street, New York, two years erecting engineer for Wasson Power & Manufacturing Company and the Middletown Car Works in the Argentine Republic, about a year in Brazil, and with his present employers for the past six years; that he had seen steel shipped out by water that was used for building purposes.

Witness further testified, referring to Plaintiff's Exhibit "B", that it showed a truss to be assembled and riveted in the field, in about twenty-one (21) or twenty-two (22) pieces for the whole truss; that this exhibit showed half the truss; that he did not think it good shop practice to ship a steel truss in

(Bill of Exceptions—Testimony of J. H. McGregor.)

that way; that it was not the custom for the contracting erector to ship it in that way; that it should be assembled and driven up; and that there was a lot of shop work on it that ought to have been complete; that that truss should have been shipped, according to custom, in four (4) pieces.

Witness further testified, referring to Plaintiff's Exhibit "C", that it showed the gusset plate riveted on; that that was the customary way in which he would expect it to come.

Witness further testified, referring to Plaintiff's Exhibit "D", that it showed steel to be riveted in the field, in six (6) pieces; that that was not the customary way in which that steel would be shipped out; that there was a lot of shop work which ought to be performed on it.

Witness further testified, referring to Plaintiff's Exhibit "E", that it showed a strut for the ship shed knocked down, riveting and assembling to be performed in the field; that he did not think that that was the customary way in which the steel should be shipped from the erector to the contractor.

Witness further testified, referring to Plaintiff's Exhibit "F", that it showed a strut for the ship shed riveted up complete; that that was a satisfactory way to ship it.

Witness further testified, referring to Plaintiff's Exhibit "O", that it was one of the trusses on the lean-to to the machine shop and boiler shop, that it

(Bill of Exceptions—Testimony of J. H. McGregor.)

was shown partly fabricated, to be assembled and driven in the field; that he did not think it was fabricated in the customary way.

Witness further testified, referring to Plaintiff's Exhibit "P", that it showed one of the trusses on the smaller buildings not fabricated, that according to his opinion it should be assembled and driven in the shop.

Witness further testified, referring to Plaintiff's Exhibit "Q", that it showed trusses for the lean-to and power house assembled complete, but broken in two (2) pieces; that that would be a satisfactory way to ship it.

Witness further testified that he had seen steel shipped in the way this steel ought to have been shipped and put in a boat, for example, the rolling equipment for a railroad in the Argentine Republic, in which there were six hundred and fifteen (615) steel under-frames; that he worked on the fabrication of this material in the shop, went to Argentine and received the stuff at Rosario, and then erected it in the interior; that these frames were built up structural shapes riveted together complete, eight (8) feet by forty (40) feet; that he had had the inspection of a sugar plant that went to Porto Rico fabricated, not only riveted complete in the shop, but the parts assembled for the complete field connections, at least the holes punched an eighth ($\frac{1}{8}$) of an inch small, the parts assembled in the shop and reamed to size, to make sure that

(Bill of Exceptions—Testimony of J. H. McGregor.)

the material would go together upon its arrival in the field; that another time when he was with Miliken Bros., the steel for a Union Station at Buenos Aires was shipped and the stuff assembled in the usual practice of assembling that sort of material.

**(Cross Examination of John Harold
McGregor for Plaintiff)**

Upon cross-examination witness testified, referring to Plaintiff's Exhibit "F", that it showed steel riveted up complete; that Plaintiff's Exhibit "Q" was also riveted complete; that he could not see any reason why they should be riveted complete and the others should not be; that there was no logical reason to his mind why the roof truss should not be riveted just the same as the other frame structure; that there was no reason why the steel shown in Plaintiff's Exhibit "E" should not be riveted complete when the steel shown on Plaintiff's Exhibit "F" was riveted complete; that as a matter of fact, it should all have been riveted; that he could not see any reason why one was and the other was not.

Witness further testified, referring to Plaintiff's Exhibit "D", that it showed the gusset plates shipped loose, also some angle plates shipped loose, and another gusset plate, down toward the middle of the diagram, shipped loose; that the gusset plates should have been riveted up to the frame but that, as concerned the angle, it might be that when it was in the field the piece set in between the gusset

(Bill of Exceptions—Testimony of J. H. McGregor.)

plate and the angle, and if that were the case, which witness did not know, not being familiar with it, if these angles were riveted in the shop they would have to be cut off again, in order to get that plate under there, and in that event the angle would have to be left off, because it would be useless to rivet it in the shop and cut it off in the field; that he could not see from the drawing whether the other piece went in there or not, that the drawing did not show.

Witness further testified that the drawing, which showed the big gusset plate, showed the reason why the gusset plate was riveted on, because in putting the hole through there the plate had to be on in order to make the hole a good fit; that the pin hole there made a difference, but that they could have shipped that loose if they had wanted to; that if that had been shipped loose, to be driven in the field, he would have passed it as an inspector if it was a good job; that a good job could have been done on it in the field, with the ordinary equipment that they had there; that they could have put the pin in and held the plate where it belonged, then driven the rivets, although he would not say that it was good practice to do it that way, although a good job could have been made out of it if men who understand their business were to do the work.

Witness further testified that, so far as concerned any likelihood of the gusset plates bending, it would have been logical to have shipped the one that was driven loose, it being a bigger gusset plate

(Bill of Exceptions—Testimony of J. H. McGregor.)

than the smaller plate; that there is no danger of bending or twisting these gusset plates in shipment if they are handled properly; that there was just as much danger of its being damaged as if witness should ship a trunk to Philadelphia, which would be liable to be broken up in the baggage car; that there was no more danger, that he could see, of this stuff being twisted when shipped by a vessel if it were riveted together, than if shipped in any other way; that he did not know that there was any more danger of its becoming twisted if it were riveted, than if it were not riveted; that he did not know that the more the stuff was riveted together, the more danger there was in shipping it that it might become twisted or buckled; that a lot of stuff might be shipped loose and something might be dropped on it and a lot of angles broken up.

Witness further testified that if the steel would get twisted going up there, it would have to be straightened out; that he could not tell what would have to be done until after he saw how it was bent; that if it were a light gusset plate, it could be just straightened up; that he never saw a truss bent so he could not tell how that would be straightened up; that he never had any trouble with trusses buckling or bending in the Argentine; that once in a while there would be something damaged; that stuff cannot be shipped and received perfectly no matter how it was assembled, one way or another.

Witness further testified that he was not a steve-

(Bill of Exceptions—Testimony of J. H. McGregor.)

dore, but knew how a lot of the steel came in the Argentine, and that it came in the hold; that these under-frames were eight (8) by forty (40) feet, and came in the hold, one set upon the other; that they were built up structures, made up of channels and I-beams, angles and plates, rectangular, not roof trusses, a different proposition, a frame structure, for box, bunk and different type cars. Witness further testified that the pieces composing the under-frames were ten (10) inch channels, instead of twelve inch channels like those on the outside of these trusses; that these trusses were built out of angles four (4) by six (6) by one-half ($\frac{1}{2}$) inch, and six (6) by eight (8) inch channels on the bottom; that the under-frames he had in the Argentine had a channel on each side, not ten (10) inch channels, but twelve (12) inch channels; that he did not know whether they were ten (10) inch or twelve (12) inch channels; that he could not tell what was the cross section of these channels; that the strength of the steel and its liability to bend would depend upon its thickness, that the stiffer the section the less likelihood there would be to bend.

Witness further testified that on one boat in Rosario, he saw the frames lying under the hatch built up one on top of the other, lying flat; that these smaller sized trusses would be all right lying flat; that he would not recommend laying the other truss flat, but would ship it standing up. Witness further testified that, if he were supervising

(Bill of Exceptions—Testimony of J. H. McGregor.)

the loading of that stuff, he would have the trusses shipped standing up, one half setting up and the other half right alongside it, so as to make a rectangle; that he supposed they would keep those trusses from moving about in the ship the same way that the under-frames were kept; that he did not know how it was done; that the cargo has to be fastened in; that they had no trouble with the under-frames moving; that he did not know how they fastened them, but that they did not move; that if they did move, they did not do any damage.

Witness further testified that he had sailed on ships several times, seen them loaded, and inspected material that went into them, but that he did not know anything about the regulations of ships or the rules regarding the loading of them.

Thereupon plaintiff rested its case.

Thereupon the defendant, to sustain the issues upon its part, offered in evidence the deposition of one WILLIAM HENRY STRATTON, taken according to stipulation, at No. 71 Broadway, Borough of Manhattan, City, County and State of New York, and in the Southern District of New York, on the 31st day of August, 1916, before John H. Gewecke, a Notary Public in and for said State, County and District, which deposition was taken upon written interrogatories, in answer to which witness testified as follows:

**(Deposition of William Henry Stratton
for Defendant)**

Witness testified that he resided at 194 Prospect Street, Ridgewood, New Jersey; that his occupation was civil engineering; that he had been engaged therein since 1888, when he graduated from Cornell University, from the course of Civil Engineering; that since that time he had had positions as civil engineer on the railroad, survey, maintenance of way work, as bridge draftsman, engineer in charge of drafting room, assistant to President, assistant to Vice President, in charge of operating, assistant to Division Manager of Sales, and in charge of the bridge and building department; that he had been connected with companies manufacturing, erecting or selling structural steel since 1889; that he was with the Edgemoor Bridge Company as draftsman for one year, with the Berlin Iron Bridge Company as draftsman for two years; as engineer in charge of drawing room for seven years; assistant to the President for one year; that in 1900, when the American Bridge Company was first formed, he became assistant to the Vice President in charge of operation, after the American Bridge Company became a subsidiary of the United States Steel Corporation, he became Assistant District Manager of Sales; and upon the formation of the United States Steel Products Company in 1903, he went with them in charge of their bridge and building department; that he is familiar with all of the classes of steel

(Bill of Exceptions—Deposition of W. H. Stratton.)

construction used in the construction of office or other buildings, dry docks, ship sheds, power houses, bridges, and other forms of railroad and industrial construction.

Witness further testified that structural steel work, which the United States Steel Products Company has sold, has been shipped to practically all parts of the globe, including China, Korea, Japan, Philippines, Hawaiian Islands, Australia, New Zealand, Straits Settlement, Java, India, Africa, Russia, Norway, Great Britain, France, Italy, Greece, Turkey, Iceland, Alaska, British Columbia, the various islands of the West Indies, and the countries in Central and South America.

Witness further testified that the material fabricated in the shop or factory for ocean shipment is not riveted up to the extent that it is when shipment is made by rail; that there were two principal reasons for this,—first, on account of the liability of injury due to the unwieldy character of completely riveted structural steel members and the possibility of their being bent or twisted; second, on account of the general nature of freight which must be paid on steamers on weight or measurement basis.

Witness further testified that structural material intended for water shipment is shipped knocked down; that this refers more particularly to lattice girders and roof trusses; that the general practice is that, if the connection plates are not

(Bill of Exceptions—Deposition of W. H. Stratton.)

too large and do not project too far beyond the main member, they are riveted to the rafter and the bottom chord; that the larger connection plates, such as the shoe plate and peak plate, are generally shipped loose, and on large trusses some of the intermediate gusset plates are shipped loose; that the web members are customarily shipped as simply punched angles, although if there are two or more angles in each member, these are riveted together with their stitch rivets; that all the rafters, the purlin connections, are customarily shipped loose, to be bolted on in the field; that lattice trusses are shipped in the same way, i. e., the top and bottom chords with small gusset plates riveted on them, the larger gusset plates loose and the web members shipped loose; that the girders and trusses fabricated in the shop or factory for ocean shipment are shipped in this way to prevent their being bent and distorted, due to the handling on account of the loading, unloading and storing the cargo, also in shifting cargo which might take place, and furthermore to reduce the expense of ocean freight by keeping the material as near weight basis as possible.

Witness further testified that in shipments by all rail, it is customary to rivet trusses and girders in single sections, limited only by the clearances which the railroads describe for their bridges and tunnels; that in export work, it is customary to ship these trusses and lattice girders knocked

(Bill of Exceptions—Deposition of W. H. Stratton.)

down, as previously testified to; that on plate girder work, it is very frequently necessary for steamer shipment to splice the girders, so as to limit the length of the pieces, while for rail shipment, girders are shipped one hundred or more feet in length; that the "A" shaped columns or large double columns, which are riveted up for rail shipment, are shipped knocked down for steamer shipment.

Witness further testified that he was familiar with the manner in which the detailed plans, known as "shop drawings", are used for the guidance in the shop in making or fabricating structural steel for use in the construction of office or other buildings, dry docks, ship sheds, power houses, bridges and other forms of railroad and industrial construction; that these drawings are followed absolutely in the preparation of steel work; that the template maker prepares his templates from the information given on these drawings; that the template is a wooden or paste-board pattern made from the detailed drawings to full size, indicating the location of all holes and cuts on the shapes or plates which are to be made a part of the member; that these templates are clamped to the steel and the holes and cuts in the shapes and plates are transferred to the steel from these templates; that the laying out of material is done strictly in accordance with the templates which have been prepared from these drawings and from the information contained

(Bill of Exceptions—Deposition of W. H. Stratton.)

on the drawing; that the punching and shop assembling of this contract was done exactly as called for on the drawings; that the riveting and painting is done exactly as the drawings call for; and that in fact the shop details are absolutely the guidance of the shop in the preparation or fabrication of the steel, and that the final, as well as the intermediate, inspection of steel work in the shop is made by comparing this finished work with the designs and details as shown on the detail drawings.

Witness further testified that in preparing shop details for work which is to be shipped by water, it is customary to detail this work so that it will be shipped in its knocked down condition, and to show on these drawings, by their symbols, what are termed open holes, which are the holes which are to be left in the work for field connection; that while, if it were to be shipped by rail, a great many of these connections which were shown as open holes, would be shown as shop riveting, indicating that the pieces were to be riveted up instead of to be shipped knocked down; that the preparation of shop details is influenced and controlled entirely by the knowledge of whether the material is to be shipped by water or rail.

Witness further testified that he was familiar with the shop details prepared for the buildings, dry dock and other structures for the Grand Trunk Pacific Railway at Prince Rupert, which material was included in the contract taken by the United

(Bill of Exceptions—Deposition of W. H. Stratton.)

States Steel Products Company with the Grand Trunk Pacific Railway, which were prepared during the years 1912, 1913, 1914 and 1915; that these shop details were prepared in accordance with the customary and usual method employed in preparing similar shop details for shipment by water, except that there were a number of cases where the shop details called for the work to be riveted when customarily it would be prepared for shipment knocked down.

Witness further testified that the only restrictions which the steamship companies place upon the size and bulk of material are that it must be limited to such size and such weight as they can handle and properly stow, that the governing features of this are the capacity of lifting apparatus, the size of the hatches, and the average room in the hold for properly stowing this material; that as these steamers are differently constructed, there were a very few who have the same limitations, so that the only requirements are to keep them within a general average; that the steamship companies, as a rule, charge for freight on a weight or measurement basis, i. e., so much per gross ton, or so much for forty cubic feet, which must equal one gross ton, and the cubic contents of a member is computed by multiplying its length by its height by its width, regardless of whether the piece is of a rectangular or triangular shape.

Witness further testified that he did not see

(Bill of Exceptions—Deposition of W. H. Stratton.)

the structural steel supplied by the defendant company for use in erecting any of the buildings at Prince Rupert actually shipped, but that he was familiar with the detailed drawings which showed the way in which it was fabricated; that he had also seen the shipping list and the detail drawings showing how the material was shipped knocked down; that the principal items on the machine shop, blacksmith shop, and foundry building were the roof trusses shown on sheets one (1) and two (2), on the power house, the roof trusses shown on sheet number five (5), on the ship shed, the struts shown on sheets number sixteen (16) and twenty-three (23).

Witness further testified that he was in charge of the bridge and building department of the defendant company; that he was connected with the control of construction work carried on by plaintiff company at Prince Rupert, and was interested to the extent of receiving reports about the condition of this contract, receiving complaints from the railroad company in regard to the work, and transmitting such instructions as were necessary to the Portland office of the defendant company to be given to the plaintiff company. Witness further testified that such instructions as he gave the Portland office of the defendant company to be transmitted to the plaintiff company, were based upon requests or demands made upon defendant company by Mr. William T. Donnelly, one of the consulting engineers of the Grand Trunk Pacific Railway, who

(Bill of Exceptions—Deposition of W. H. Stratton.)

had the direct charge of the design and installation of this work for the railroad at Prince Rupert; that the plaintiff company alone was responsible for the carrying out of the orders received from the Grand Trunk Pacific Railway; that during his connection with the erection of this work, he did not receive or act under the orders or instructions of any of the officers or agents of the defendant company.

Witness further testified that he was familiar with the terms and conditions of the contract made by and between the Grand Trunk Pacific Railway and the defendant company during the year 1912 for the furnishing by the defendant company to the Grand Trunk Pacific Railway of certain structural steel; that the original quotation of the defendant company was made to the Grand Trunk Pacific Railway under date of September 12, 1912; that these prices were revised under date of October 21, 1912; that upon the request of Mr. Guest, Purchasing Agent for the Grand Trunk Pacific system, witness went to Montreal with a view to closing the contract for the work and, after several consultations, agreed to the prices which were set forth in an order from the Grand Trunk Pacific Railway under date of September 16, 1912, which order was finally accepted by the defendant company; that the original proposal was based upon shipment from either Pittsburg or Chicago, and shipment from these points by two different routes, one from point of manufacture to New York and thence by steamer to

(Bill of Exceptions—Deposition of W. H. Stratton.)

Prince Rupert, and the other from point of manufacture by rail to Vancouver and by steamer from Vancouver to Prince Rupert; that the price based upon fabrication at Pittsburg and shipment to New York and thence by steamer to Prince Rupert was accepted; that the order consisted of defendant company's building and erecting upon foundation and pontoons furnished by the Grand Trunk Pacific Railway, also included the Canadian duties which were to be paid by the Grand Trunk and deducted from moneys due the defendant company; that the erection was sub-let by defendant company to Poole-Dean Company; that it was the intention a formal contract should be drawn up by Mr. W. T. Donnelly and the defendant company and executed; that witness had several talks with Mr. Donnelly in reference to this contract, but that Mr. Donnelly advised that he had not been able to make arrangements with Mr. Guest to come to New York and go over some points which he had in mind; that under date of January 22, 1913, witness wrote to Mr. Donnelly in regard to the method of payment, in view of the fact that the formal contract had not been drawn up; that Mr. Donnelly made no written answer to this letter, although he had several talks with the witness on the subject; that under date of December 3, 1913, Mr. Donnelly wrote witness a letter in reference to terms of payment, to which witness replied under date of December 5th, 1913, and that this letter was the basis of the bill-

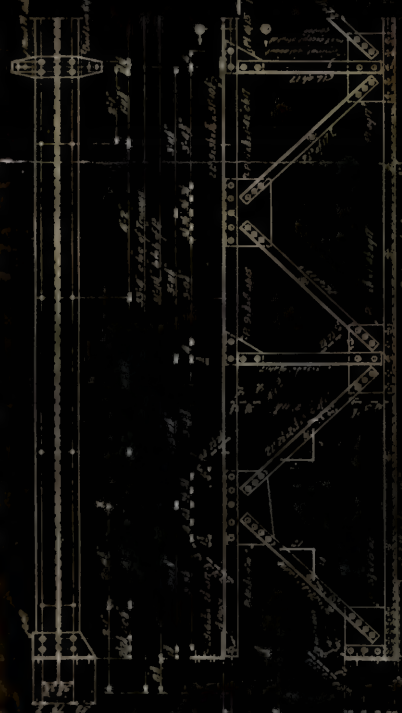
(Bill of Exceptions—Deposition of W. H. Stratton.)

ing of this contract. Witness further testified that it was distinctly understood at the time this contract was taken, that Mr. Donnelly, as consulting engineer for the Grand Trunk Pacific Railway, was in charge of this work, and that defendant company were to look to Mr. Donnelly for instructions in regard to carrying out portions of this contract.

Witness further testified that the claim of the plaintiff company, amounting to Four Hundred Dollars and Seventy cents (\$400.70), represented extra field work over and above what was called for in the original agreement, and that, as plaintiff company was doing certain extra work for the Grand Trunk Pacific, defendant company requested them to render a bill for this extra work direct to the Grand Trunk Pacific, and that witness had been advised by Mr. Donnelly that he (Mr. Donnelly) approved the voucher for this amount, and that it was forwarded to the Grand Trunk Pacific.

Witness further testified, referring to Plaintiff's Exhibit "P" and Plaintiff's Exhibit "O", that the peak and shoe gussets and work of this character would frequently be shipped loose; referring to Plaintiff's Exhibit "Q", that trusses "T-9", "T-6", "T-7" and "T-8", r. and l., usually are shipped knocked down with the web members all loose; referring to Plaintiff's Exhibit "F", that columns "C-3", "C-4", "C-5" and "C-12", usually are shipped knocked down, and the web members loose.

Thereupon defendant offered in evidence certain



STRUTS S33

Refer to page 100 for details.



STRUTS S40 & S41

Refer to page 100 for details.



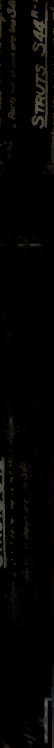
STRUTS S42

Refer to page 100 for details.



STRUTS S43

Refer to page 100 for details.



STRUTS S44

Refer to page 100 for details.

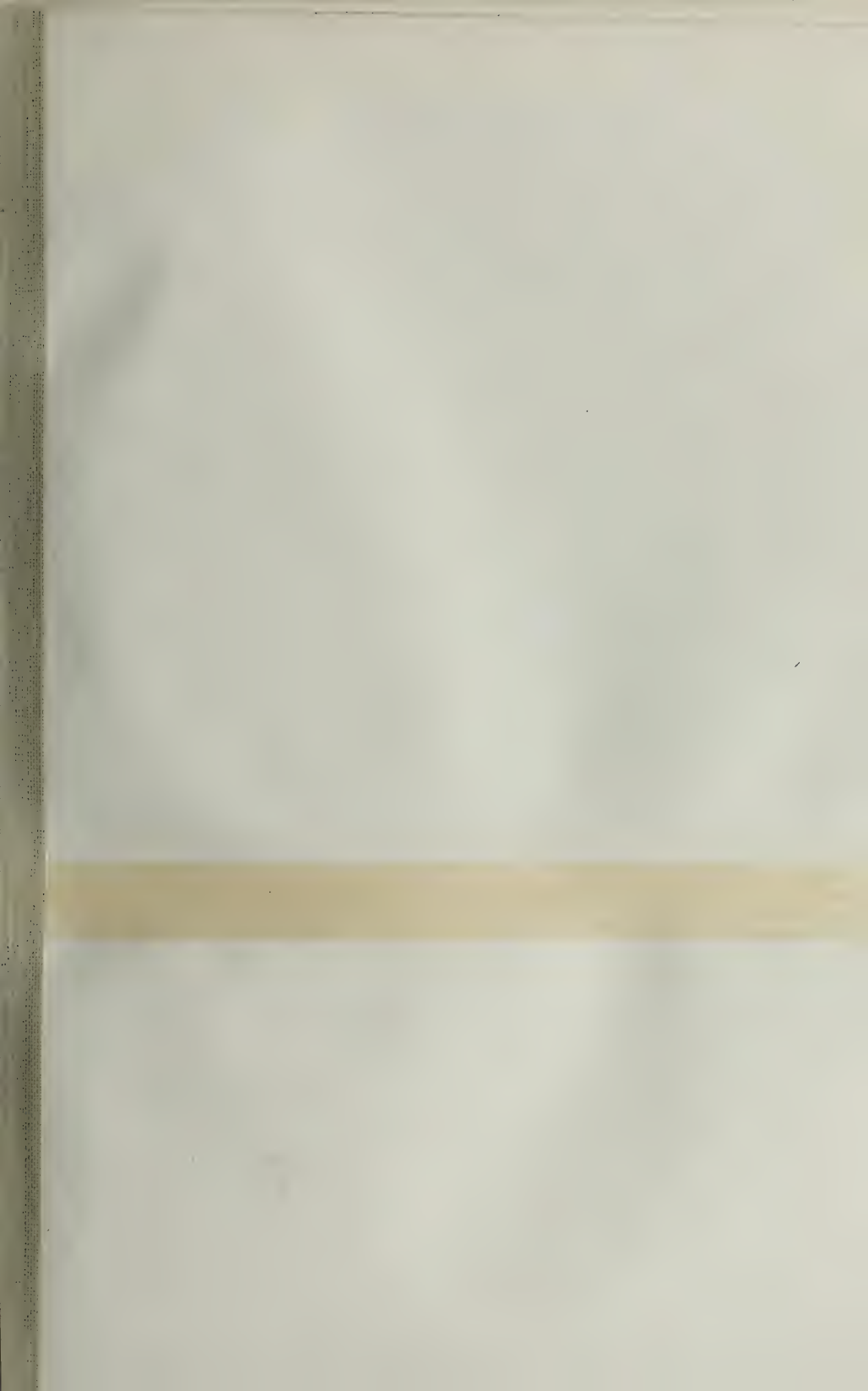


REQUIRED STRUTS	REMARKS
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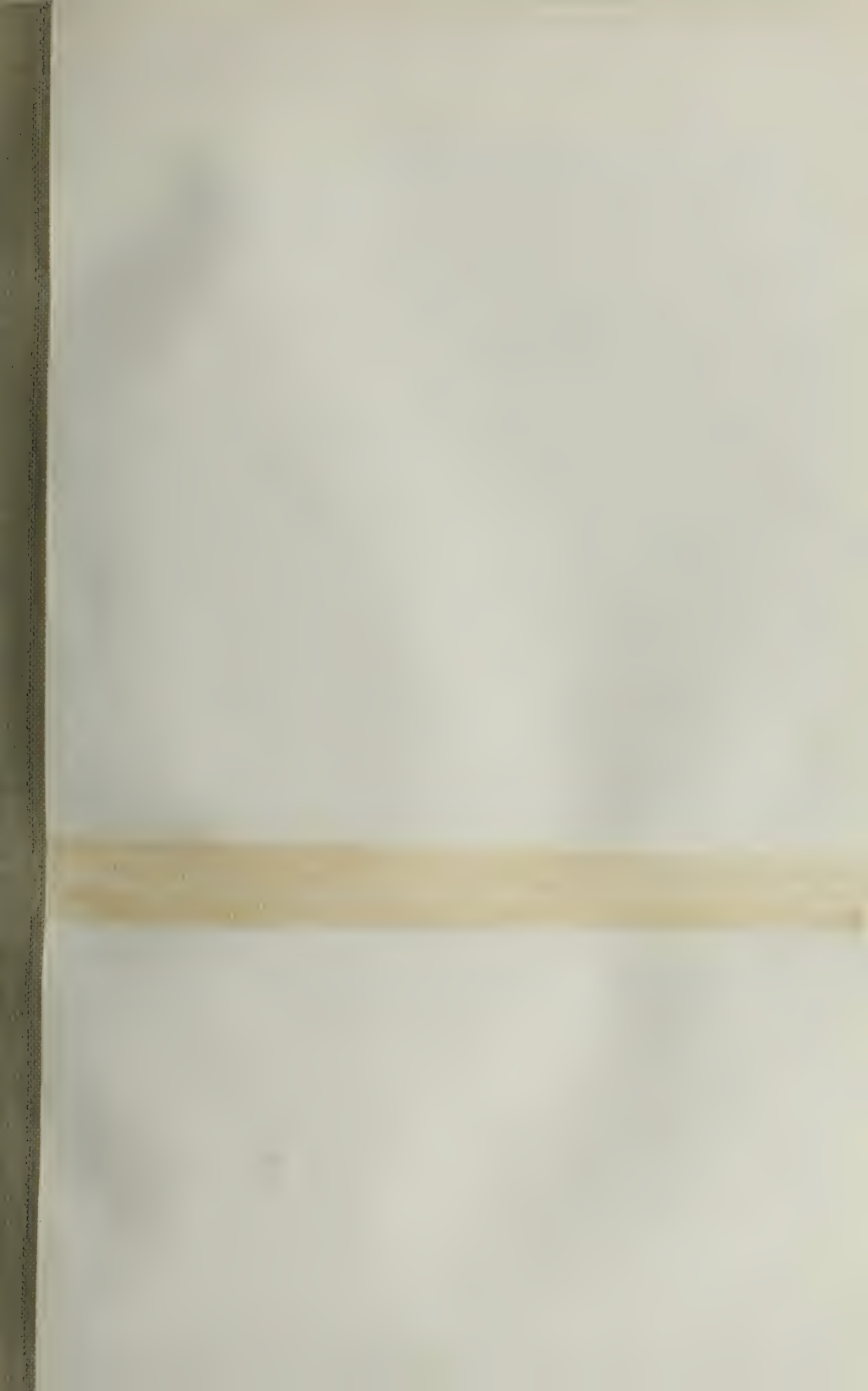
STRUTS

Ship Repair Building
Grand Tower
Electric Railway









[illegible]

SHIP SHED

Ship Repair & Shipbuilding Plant

Grand Trunk Pacific Railway

P.O. BOX 100

VANCOUVER, B.C.

AMERICAN BRIDGE CO.

Z-67

SHIP SHED

DEFENDENCE'S EXHIBIT 12

SHIP SHED

Ship Repair & Shipbuilding Plant

Grand Trunk Pacific Railway

P.O. BOX 100

VANCOUVER, B.C.

AMERICAN BRIDGE CO.

Z-67

SHIP SHED

Ship Repair & Shipbuilding Plant

Grand Trunk Pacific Railway

P.O. BOX 100

VANCOUVER, B.C.

AMERICAN BRIDGE CO.

Z-67

[illegible]

DEFENDENCE'S EXHIBIT 12

SHIP SHED
Ship Repair & Shipbuilding Plant
Grand Trunk Pacific Railway
FIELD BUILDING
EST. 1908
2-67
AMERICAN BRIDGE CO.

TRUSSES

1/2" = 1' 0"

1/4" = 1' 0"

1/8" = 1' 0"

1/16" = 1' 0"

1/32" = 1' 0"

1/64" = 1' 0"

1/128" = 1' 0"

1/256" = 1' 0"

1/512" = 1' 0"

1/1024" = 1' 0"

1/2048" = 1' 0"

1/4096" = 1' 0"

1/8192" = 1' 0"

1/16384" = 1' 0"

1/32768" = 1' 0"

1/65536" = 1' 0"

1/131072" = 1' 0"

1/262144" = 1' 0"

1/524288" = 1' 0"

1/1048576" = 1' 0"

1/2097152" = 1' 0"

1/4194304" = 1' 0"

1/8388608" = 1' 0"

1/16777216" = 1' 0"

1/33554432" = 1' 0"

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DEFENDENCE'S EXHIBIT 12

SHIP SHED
Ship Repair & Shipbuilding Plant
Grand Trunk Pacific Railway
FIELD BUILDING
EST. 1908
2-67
AMERICAN BRIDGE CO.

TRUSSES

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1/332306998946228968225951765070086144" = 1' 0"

DEFENDENCE'S EXHIBIT 12

SHIP SHED
Ship Repair & Shipbuilding Plant
Grand Trunk Pacific Railway
FIELD BUILDING
EST. 1908
2-67
AMERICAN BRIDGE CO.

TRUSSES

1/2" = 1'-0"

1/4" = 1'-0"

1/8" = 1'-0"

1/16" = 1'-0"

1/32" = 1'-0"

1/64" = 1'-0"

1/128" = 1'-0"

1/256" = 1'-0"

1/512" = 1'-0"

1/1024" = 1'-0"

1/2048" = 1'-0"

1/4096" = 1'-0"

1/8192" = 1'-0"

1/16384" = 1'-0"

1/32768" = 1'-0"

1/65536" = 1'-0"

1/131072" = 1'-0"

1/262144" = 1'-0"

1/524288" = 1'-0"

1/1048576" = 1'-0"

1/2097152" = 1'-0"

1/4194304" = 1'-0"

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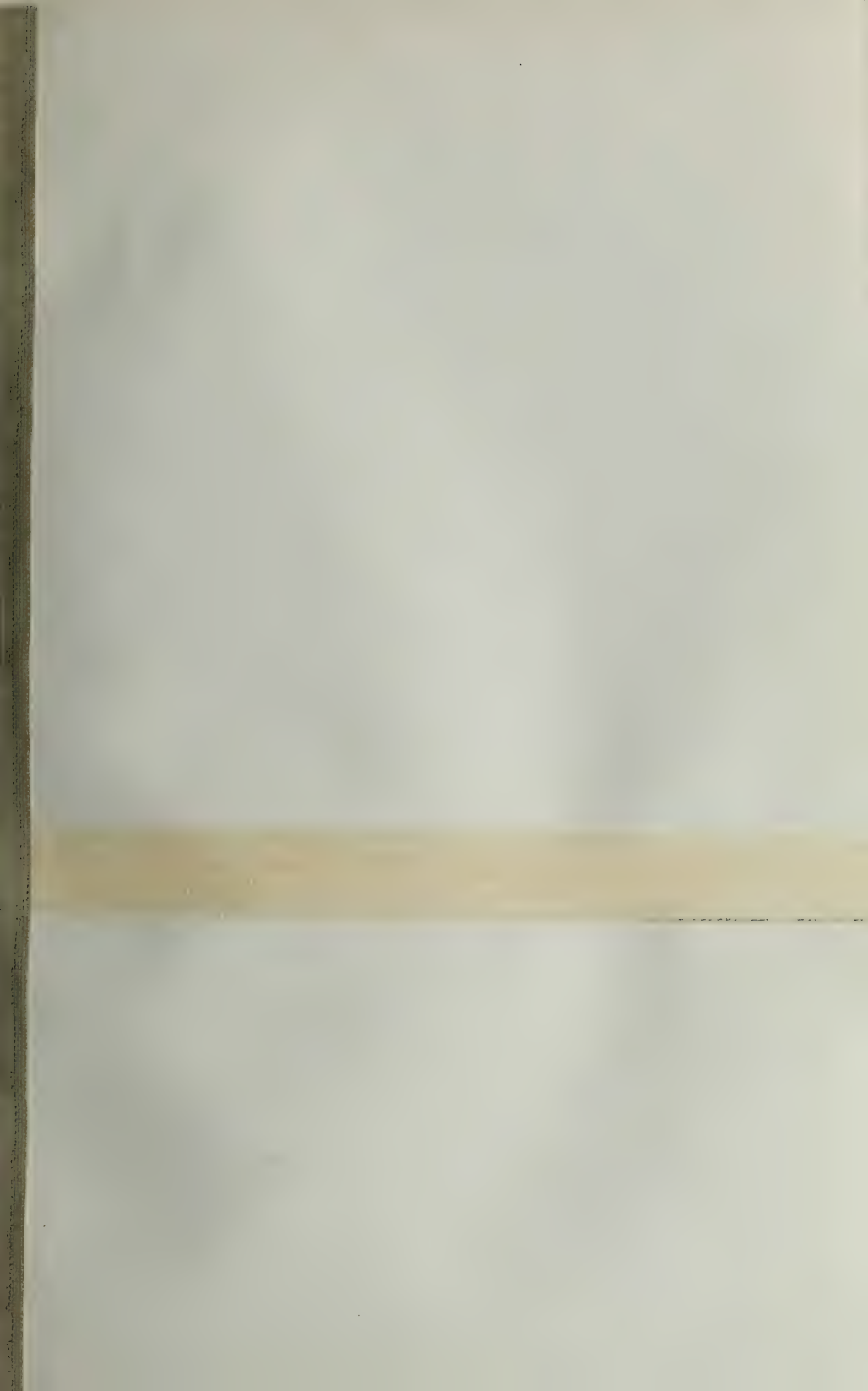
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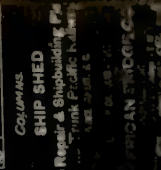
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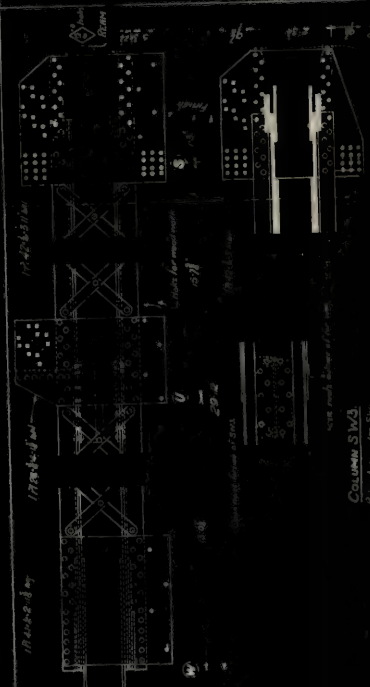
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COLUMN Si/MSL



COLUMN SW3.



COLUMNS

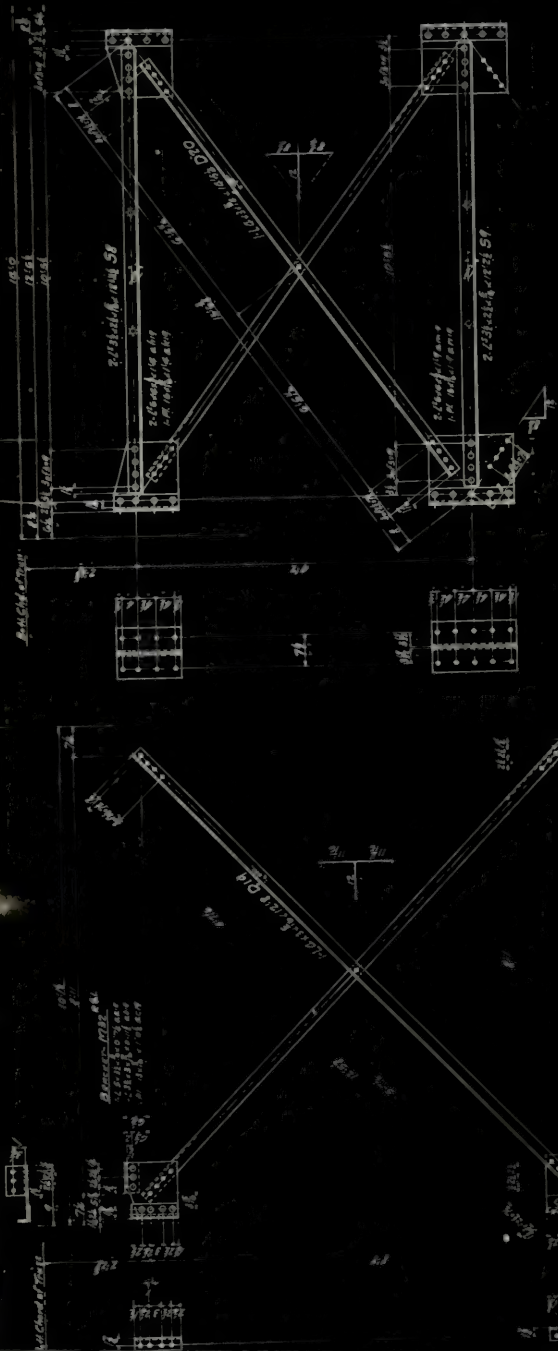


1875-1881, O. H. Street,
Hartford, Conn. By Henry D. Woodbury.

Numero	COUNTS	SW
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3	.	SW
4	.	SW
1	.	SW
1	.	SW

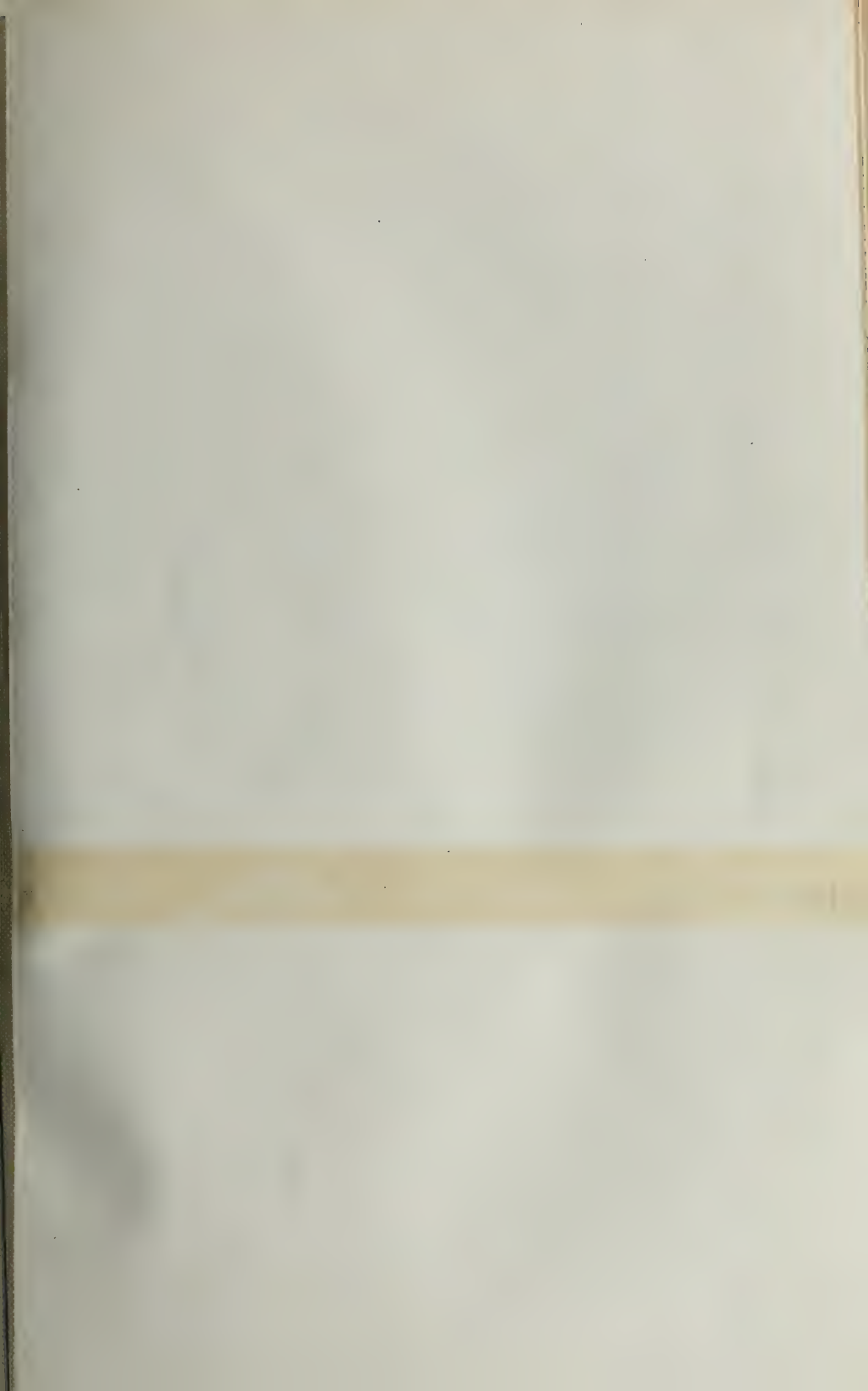
COLLINS
SHIP SHED
Ship Repair & Shipbuilding
Grand Trunk Pacific
P.O. Box 1000
Vancouver, B.C.
V6C 2Y5
Tel: 604-681-1111
Fax: 604-681-1112



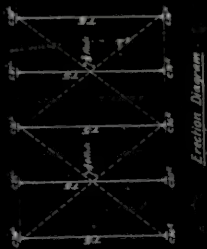


NO.	DESCRIPTION	QTY	UNIT
1	STEEL	1	TON
2	STEEL	1	TON
3	STEEL	1	TON
4	STEEL	1	TON
5	STEEL	1	TON
6	STEEL	1	TON
7	STEEL	1	TON
8	STEEL	1	TON
9	STEEL	1	TON
10	STEEL	1	TON

POWER HOUSE
 Ship Repair & Shipbuilding Plant
 Grand Trunk Pacific Railway
 1000 WEST 8TH ST.
 S.S.P. CO. MAR. 1911
 AMERICAN BRIDGE CO.



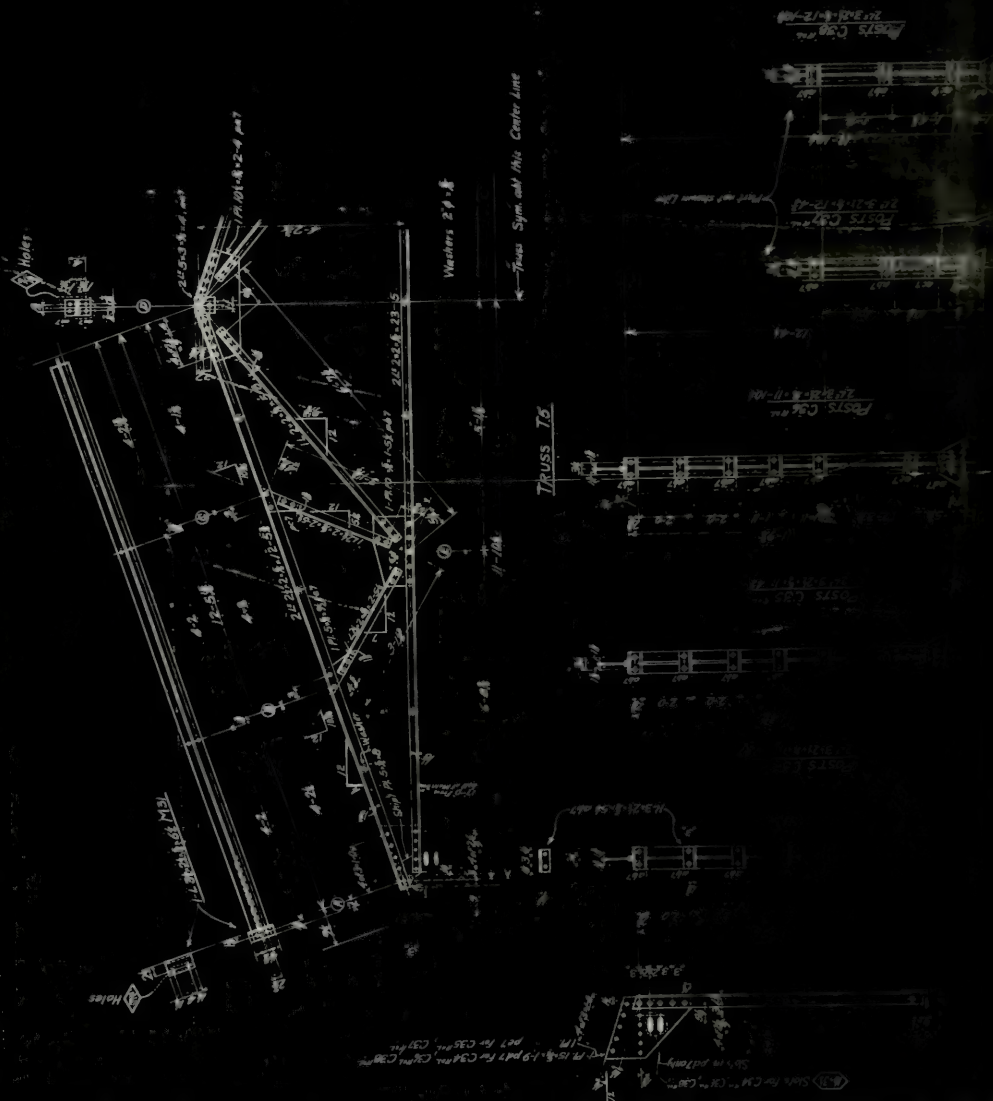
Defendant's Exhibit 9

[illegible]

POWERHOUSE

Ship Repair & Shipbuilding Plant
Grand Trunk Pacific Railway

100% Satisfaction Guarantee





(Bill of Exceptions—Deposition of W. H. Stratton.)

blue prints, which were identified by the witness, received in evidence, and marked respectively "Defendant's Exhibits 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18."

(Bill of Exceptions—Deposition of W. H. Stratton.)

Witness further testified, referring to Defendant's Exhibit 7, that the large gusset plate at the top of the column is usually shipped loose; referring to Defendant's Exhibit 8, that trusses T-5 usually are shipped knocked down with the web members and peak gusset loose; referring to Defendant's Exhibit 9, that the connecting plates and struts, S-8, and S-9, are usually shipped loose; referring to Defendant's Exhibit 10, that the large plates at the top of the columns usually are shipped loose; referring to Defendant's Exhibit 11, that the connecting plates in the center of these columns usually are shipped loose; referring to Defendant's Exhibit 12, that the connection plates at the end of the bottom chord, usually are shipped loose; referring to Defendant's Exhibit 13, that the projecting plates and connection in the center and top chords usually are shipped loose; referring to Defendant's Exhibit 14, that the plates for the connecting struts, S-6 to S-5, usually are shipped loose and not riveted to strut S-5; referring to Defendant's Exhibit 15, that the plates splicing chord sections FE-1 and FE-2 to EB-1 and EB-2 usually are shipped loose; referring to Defendant's Exhibit 16, that the struts usually are shipped knocked down, all the web members loose; referring to Defendant's Exhibit 17, that struts S-61, S-62, S-63, S-64 and S-65 usually are knocked down, all web members loose; referring to Defendant's Exhibit 18, that

(Bill of Exceptions—Deposition of W. H. Stratton.)

there are several connection plates to columns C-10 and C-11 which usually are shipped knocked down.

Witness further testified that in giving the detailed testimony concerning the drawings previously referred to, he was pointing out work which was riveted in a manner not customary for water shipment, and was pointing out that the drawing room did not follow instructions in regard to shipping this work knocked down as they usually do for water transportation.

Thereupon the defendant, to sustain the issues upon its part, called as a witness one FRANK EDWARD FEY, who was duly sworn and testified as follows:

**(Direct Examination of Frank Edward Fey
for Defendant)**

Witness testified that he resided in Portland and was with the defendant company as contracting agent; that he had been engaged in his present business contracting for the United States Steel Products Company, for seven years, estimating and contracting; that he is familiar with the manner in which shop details are prepared and made up for structural steel work of the character involved in this controversy; that he had had three years in the drafting room and making details and making these plans, and two years nothing but estimating,

(Bill of Exceptions—Testimony of Frank E. Fey.)

having been with the company twelve years, the first five years doing that work and the other seven years in contracting work.

Witness further testified, referring to Defendant's Exhibit 18, that the plates to columns C-10 and C-11, which usually are shipped knocked down, were shown riveted to the column; referring to Plaintiff's Exhibit "F", that what was termed "web members" were diagonals and were all riveted; that that section was all riveted in one piece, and so shipped; referring to Defendant's Exhibit 17, that it showed the web members riveted to the top and bottom chords; that it was so shipped, all riveted in one piece; that these detailed drawings were prepared in the Ambridge plant of the American Bridge Company, located about eighteen miles out of Pittsburg; referring to Defendant's Exhibit 16, that all the struts shown thereon were indicated to have the web members diagonally riveted in the shop, and that it was so riveted and shipped; referring to Defendant's Exhibit 15, that the sections FE-1 and FE-2 were shown spliced to the other chord sections EB-1 and EB-2, and that the spliced plates referred to are riveted to the member showing open holes for making connections in the field with the other member; referring to Defendant's Exhibit 14, that it showed bracings which went between the columns and the ship shed and the large detail of one of the large sections, showing the larger center gusset plate shipped loose

(Bill of Exceptions—Testimony of Frank E. Fey.)

and, on strut S-5, two plates for connecting the vertical member to the horizontal member were riveted to the horizontal member, and were so shipped; referring to Defendant's Exhibit 13, that the plates, referred to by William Henry Stratton as being usually shipped loose, were shown riveted to the member, and so shipped; referring to Defendant's Exhibit 12, that the gusset plate at the end is shown riveted to the member, and so shipped; referring to Defendant's Exhibit 11, that the connecting plates, referred to by William Henry Stratton shown on the detail near the center of the member, were shipped loose, according to the usual and customary manner; that they could have been riveted to the column and still shipped, but that it would not have been customary in shipping it by boat; that the plate was six (6) feet one and three-quarter ($1\frac{3}{4}$) inches long and five-eighths ($\frac{5}{8}$) of an inch thick; that if it had been shipped by rail, it would in all probability have been riveted up.

Witness further testified, referring to Defendant's Exhibit 10, that the large plates at the top of the columns were shown to be riveted in the shop and were so shipped; that the plates were three and a half ($3\frac{1}{2}$) feet by three (3) feet eleven (11) inches and seven-sixteenths ($\frac{7}{16}$) of an inch thick, and projected beyond the outside of the member about nine and a half ($9\frac{1}{2}$) inches; referring to Defendant's Exhibit 9, that struts S-8 and S-9 were shown with the plates riveted to the main member

(Bill of Exceptions—Testimony of Frank E. Fey.)

and the diagonals loose; referring to Defendant's Exhibit 8, that it showed the truss riveted in one (1) piece, in other words, that the whole truss, or twice what was shown on the drawing, was shipped riveted up; that the truss was about four (4) feet deep by about twenty-four (24) feet long; that all these detailed drawings were prepared in the drawing room, in the drafting department, of the American Bridge Company at the Ambridge plant; referring to Plaintiff's Exhibit "Q", that the web members or diagonals and the top and bottom chords were all riveted together on one part of the truss, and all riveted together on the other part of the truss, each part being shipped in one piece; that the truss, if it had not been broken in the middle, would have been approximately fifty-one (51) feet long; referring to Defendant's Exhibit 7, that the large gusset plate at the top of the column was shown riveted to the column; that these columns are generally built up of several pieces, four (4) angles and plates, or a couple of channels; that the gusset plate was shipped just as it was shown on the drawing, riveted at the top of the column; referring to Plaintiff's Exhibit "O", that the peak gusset was shown riveted at the top chord of the truss, and the shoe gusset riveted to the bottom chord of the truss; referring to Plaintiff's Exhibit "P", that the peak plate or gusset plate was shown riveted at the top chord and the shoe gusset also riveted; that

(Bill of Exceptions—Testimony of Frank E. Fey.)

these were the same peak and shoe gussets to which William Henry Stratton had testified.

Thereupon the defendant, to sustain the issues upon its part, offered in evidence the deposition of one J. H. PILLSBURY, taken according to stipulation, in the City of Prince Rupert in the Province of British Columbia, on the 29th day of September, 1916, before Lewis W. Patmore, a Commissioner authorized to administer oaths in the said Province, which deposition was taken upon written interrogatories, in answer to which witness testified as follows:

(Deposition of J. H. Pillsbury for Defendant)

Witness testified that he resided at Prince Rupert, British Columbia, and was by occupation a civil engineer; that he had been engaged in that occupation for twenty years, having graduated from the Massachusetts Institute of Technology, Civil Engineering Department, in 1896, having been a rod man and inspector of sewer construction at Brockton, Massachusetts, in summer vacations; that from July, 1896, to January, 1899, he was transit man and resident engineer for the Massachusetts Highway Commission, except from February to September, 1898, when he was with the Metropolitan Sewage Company, locating a new high level gravity main sewer to the sea; that from January to May,

(Bill of Exceptions—Deposition of J. H. Pillsbury.)

1899, he was with the Boston Elevated Railway as computer and locating under ground topography; in May, 1899, he was appointed Junior Engineer, United States Engineer at large, and served in that department until May, 1906, serving during that period as transit man on hydrographic surveys, inspecting dredging and jetty construction, and in charge of various hydrographic surveys and river and harbor works; that from May, 1903, to May, 1906, he was chief draftsman for the Boston and Jacksonville offices, in the latter of which the work included fortification and river and harbor work, with the designing of a fire control system for the fortifications at Key West and Tampa, the Jacksonville District taking in all except the panhandle of Florida; that in May, 1906, he was appointed assistant engineer of the Grand Trunk Pacific, Harbor Department, at Prince Rupert, B. C., in charge of topographic and hydrographic surveys, covering all the land holdings of the company in the vicinity and the passages surrounding the islands on which the city is located, other work being the designing and supervising the construction of the Grand Trunk Pacific wharves, warehouses and buildings, and clearing of the townsite; that as a member of the local Board of Engineers, he had direct charge of the grading of the first streets, building roads and temporary water and sewer systems, also the supervising of the laying out of the present townsite which now covers two thousand acres; that in

(Bill of Exceptions—Deposition of J. H. Pillsbury.)

May, 1910, he went into private practice in Prince Rupert, in which he had continued to date; that he laid out and supervised the second section of sewers in Prince Rupert, made examinations, reports and plans for several water supply systems in the vicinity, engaged in general municipal engineering, constructed several wharves, including the Dominion Government Quarantine Wharf, and a concrete beacon on Herbert Reef; that he designed and laid out dams and wharves at North Prince Rupert, and reported on a water supply system for the company controlling this townsite, although the outbreak of the war shut down all operations there just after the townsite was cleared; that, acting as resident engineer for W. T. Donnelly of New York, he had had complete charge of the construction of the Grand Trunk Pacific dry dock and ship repair shops at Prince Rupert, including preliminary surface borings and soundings over the site; that he was a member of the "British Concrete Institute" and of the "Canadian Society of Civil Engineers."

Witness further testified that all of the work done by the Poole-Dean Company at Prince Rupert between September 12th, 1912, and July 31, 1915, upon the buildings and other structures of the Grand Trunk Pacific Railway, was done under his supervision or that of his inspectors; that he was simply the engineer in charge, acting on behalf of W. T. Donnelly, who was the chief engineer in

(Bill of Exceptions—Deposition of J. H. Pillsbury.)

charge of the work for the Grand Trunk Pacific Railway Company and the Grand Trunk Pacific Development Company, Limited; that witness was Donnelly's representative on the ground, and appointed inspectors under him who assisted him in the supervision of the work; that during his connection with the operation, control and management of this construction work, he received instructions from Mr. Donnelly only; that he transmitted such instructions to the representatives of the defendant company, Messrs. Steele and Fey, who were there part of the time during which the work was carried on, and to Mr. Dean, who carried out the work for the plaintiff company; that so far as witness was concerned, the defendant company was in actual control of the carrying out of the work, but the defendant company did not keep a representative on the work all the time, and consequently most of witness' instructions were given direct to the plaintiff company, who, as witness had always understood, were simply sub-contractors under the defendant company, and whom witness always regarded as such. Witness further testified that, during his connection with the operation, control and management of this construction work, he exercised only such control of the work as is customarily exercised by the engineer in charge; that he never received or acted under any orders or instructions concerning such operation, control or management from the defendant company, excepting that the de-

(Bill of Exceptions—Deposition of J. H. Pillsbury.)

fendant company asked him to notify them if he had any difficulty in getting the plaintiff company to obey his instructions.

Witness further testified, in response to a question as to whether or not any understanding existed between the Grand Trunk Pacific Railway and the plaintiff company concerning the furnishing or reservation by the Grand Trunk Pacific Railway of space for storing and handling the structural steel for this construction work, that before the arrival of each vessel bringing steel, he went into the question of storage room with Mr. Dean; that several other contracts were being carried on, and that it was, therefore, necessary to specify areas where the Poole-Dean Company could sort and store their steel, and that this was done; that the "Buena Ventura" tied up at the eastern end of section "A" and was unloaded there; that he could not see that any special difficulty was experienced in moving the steel to the foundry, but that the steel for the machine shop and boiler and blacksmith shop could not be placed directly on the sites of these buildings on account of the anchor bolts not being yet set; that it was, however, placed on the platform along the edge of the machine shops, and was convenient to the work; that the power house material was hauled to a point close beside the building; that plenty of opportunity and room for sorting was given this shipment, and that no complaint was made; that before the "Kentra" arrived, it was

(Bill of Exceptions—Deposition of J. H. Pillsbury.)

decided that the steel for the ship shed would be unloaded on scows, towed around to the launching platform and stacked there; that this was the most convenient and cheapest way to get it there, and would have been had the platform been entirely clear, on account of the distance between the ship and site; that the wharf was, however, somewhat obstructed by tracks, etc., which would have interfered with hauling the heavy members of the ship shed, but which would not interfere with hauling lumber, etc., along the wharf; that filling between the two rows of piers in the ship shed was not completed for several days after the "Kentra" arrived, when the tracks were taken up and the deck planks replaced, that the launching platform was, however, entirely clear and afforded plenty of room for sorting and piling their material.

Witness further testified, in response to the same question, that on account of plaintiff company's anxiety to get the material off quickly, very little sorting was done, and that the steel was all piled over an area of about eighty (80) feet by one hundred and fifty (150) feet; that some of the material for the wings of the dock and erection dock steel was also piled there; that the large columns, girders and bases were sorted out, but not much else, and that, in his judgment, considerably more sorting could have been done; that it would have been an impossibility to berth a ship in front of the launching platform; that there was no use

(Bill of Exceptions—Deposition of J. H. Pillsbury.)

in unloading the "Kentra" on section "A", because it was much cheaper to handle the steel as it was handled; and that, as a matter of fact, in conversation with Mr. Dean several weeks before the "Kentra" came in, he and Mr. Dean came to the conclusion, and Mr. Dean then determined, to handle the ship shed steel by scows. Witness further testified, in response to the same question, that had the contractor chosen the "Arna" could have been berthed in the same location as the "Buena Ventura," and the material could have been delivered from there to the place where it was piled in front of the machine shop, which, however, in witness' judgment, would have been more expensive than the method employed of using scows, and that he had no doubt that it was for this reason Mr. Dean did use scows; that there was no reason why the material landed on the pier could not have been moved around to the platform opposite the machine shop, and the vessel then turned around and the after hatch loaded on the pier; that this would have meant delay to the vessel, however, which they were anxious to avoid and besides, in witness' judgment, the steel was more cheaply handled by scows; that plaintiff company had very little equipment for hauling material, but did have excellent derrick equipment, and that witness believed that in this case, as in the case of the "Kentra," Dean chose the more economical method of getting the steel unloaded and piled; that in general witness con-

(Bill of Exceptions—Deposition of J. H. Pillsbury.)

sidered the plaintiff company was afforded very good facilities for handling and storing material; that as a matter of fact, some of the other contractors were inconvenienced considerably through witness compelling them to keep the platforms as clear as possible in order to accommodate steel; that much of the material used in other parts of the plant had to be hauled a considerable distance back from the platform and stored, but that the plaintiff company never had to do this.

To this answer plaintiff objected on the ground that it was not responsive to the question and incompetent. Thereupon the Court overruled the objection of the plaintiff, and to this ruling of the Court the plaintiff excepted, and said exception was allowed.

Witness further testified that the space previously described in his testimony was reserved by him for plaintiff company and furnished to them; that no understanding existed between the Grand Trunk Railway Company and the plaintiff company concerning the construction or furnishing of a pontoon to the plaintiff company until just before commencing the work of erecting the steel wings of the floating dry dock; that Dean asked to be allowed to use one of the twelve pontoons of the dry dock as a derrick scow, and permission was given by witness and approved by Mr. Donnelly; that this pontoon was used by plaintiff company all through the erecting of the steel work on the dry

(Bill of Exceptions—Deposition of J. H. Pillsbury.)

dock, and that no rental was paid by them, nor were they asked to pay anything for its use; that no pontoons were constructed for the plaintiff company, but they were allowed the use of one as previously testified to; witness further testified that plaintiff company's bill for extra work on the wings of the dry dock, aggregating Four Hundred Dollars and Seventy cents (\$400.70), was approved and forwarded by witness through Mr. Donnelly to the Grand Trunk Pacific Railway Company for payment on December 14, 1915; that it was customary under this contract to pass estimates on account of labor involved in extra work for the plaintiff company and not in favor of the defendant company.

Thereupon the defendant, to sustain the issues upon its part, offered in evidence the deposition of one STETSON G. HINDES, taken according to stipulation, in the City and County of San Francisco, State of California, and in the Northern District of California, on the 29th day of September, 1916, before Eugene W. Levy, a Notary Public in and for said State, County and District, which deposition was taken upon written interrogatories, in answer to which witness testified as follows:

**(Deposition of Stetson G. Hindes for
Defendant)**

Witness testified that he resided at 2519 Broadway, San Francisco, California; that he was a civil engineer and contractor by occupation; that he graduated from the Massachusetts Institute of Technology, Mechanic Arts Course, in 1888, worked four years drafting in machine works, five years assistant engineer of Harbor Commission in San Francisco, three years engineer of the City Street Improvement Company, three years in private practice as consulting engineer, and thirteen years with the San Francisco Bridge Company, three years as Pacific Coast manager and ten years as president. Witness further testified that while he had never been connected with the manufacture of steel, he had purchased a good deal of it, erected and had to do with its erection during most of his engineering experience, especially during the past thirteen years here while in charge of the San Francisco Bridge Company; that he had erected a great number of steel bridges in all parts of California, and a number of large wharves of steel construction, among them, Fort Mason, the Portland wharves and warehouses, and at the present time the Pearl Harbor Dry Dock at Hawaii, which contained a large amount of structural steel, and the Hunter's Point Dry Dock at San Francisco; that he had had personally to do with all of this work and is familiar with steel structures and their erection; that the Fort Mason Transport Wharves used about four

(Bill of Exceptions—Deposition of G. Hindes.)

thousand (4000) tons, and about five thousand (5000) tons of structural steel have been used in the Pearl Harbor Dry Dock.

Witness further testified that the structural steel, which is fabricated at the shop for shipment by boat, is not assembled and riveted into any large units, but the shop riveting is confined to single members in such way as to keep their size and shape as small and compact as practicable and not liable to injury in handling; that structural steel fabricated for shipment by water is left knocked down so that there will be no large or unwieldy pieces, and, as a consequence, a large amount of field riveting is required when erecting such material; that each column, floor beam, etc., would ordinarily be shipped as a separate piece, and the trusses would have their main columns shipped as separate pieces, each brace would also be shipped separately and gusset plates, which were not too large would be riveted to the principal member, but if these gusset plates were particularly large or projected out from the main member too far, they also would be shipped separately, and would have to be riveted in place when the steel reached its destination.

Witness further testified that, in shipping steel by rail, it is possible to have more of the assembling and riveting done in the shop and less in the field at the time of the erection, for shipment by rail is governed entirely by weight, and the only necessity for compactness is that required by the limit of the

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fair clearance for tunnels, etc.; that steel shipped by rail is usually loaded into cars at the factory and shipped through to its destination without re-handling, and that there is little tendency for the steel to shift about or become distorted, whereas steel which is intended for water shipment is usually first shipped by rail to the seaboard, and then re-handled into ships and often again loaded onto cars at the end of the water trip; that it is subject to more or less rough handling by stevedores and liable to distortion and injury; that the size of the piece is limited by the derricks and gears used for loading the vessel and by the size of the hatch, and more particularly by the vessel's rule of charging freight by measurement if this will exceed the actual weight.

Witness further testified that he was familiar with the manner in which shop details for fabricating structural steel are prepared, and could assert that these detailed drawings govern fully the exact amount and character of all work to be done in the shop, and that no shop would be expected to deviate in the slightest degree from the exact work indicated by the shop details; that the drafting office should know, before preparing such detailed drawings, whether the material is to be shipped by rail or water, and would be guided entirely by this information; that if the material were to be shipped by rail, the drawings would be made to show large member units and more shop riveting than if for

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water shipment, where the limitation of the ship's option for charging freight by measurement instead of actual weight would be kept in mind, and also the fact that the material must be re-handled, possibly several times, before reaching its destination, and that it must be lowered through ship's hatches and stored below with no positive assurance against shifting and becoming injured.

Witness further testified that he had carefully examined the specifications, original designs, and shop details covering the power house, the ship shed, the machine shop, boiler and blacksmith shop, foundry and coal storage buildings, prepared by the American Bridge Company for the defendant company for use in constructing and erecting the buildings of the Grand Trunk Pacific Railway at Prince Rupert, British Columbia, and understood them clearly; that he considered that these shop details show the customary and usual amount of fabrication for water shipment, and that, if he were figuring upon the erection of the steel which was to be transported by water, he would figure upon doing fully the amount of field assembling and riveting that these shop details show would be required. Witness further testified, referring to Plaintiff's Exhibit "B", that the roof truss is indicated to be assembled in the field, but that the top and bottom chords are riveted up complete with their gusset plates in place, except the end gusset plates, which

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are so large to take up extra room in shipping and would be very apt to become bent.

Thereupon defendant offered in evidence a blue print, which was received in evidence and marked "Defendant's Exhibit 19."

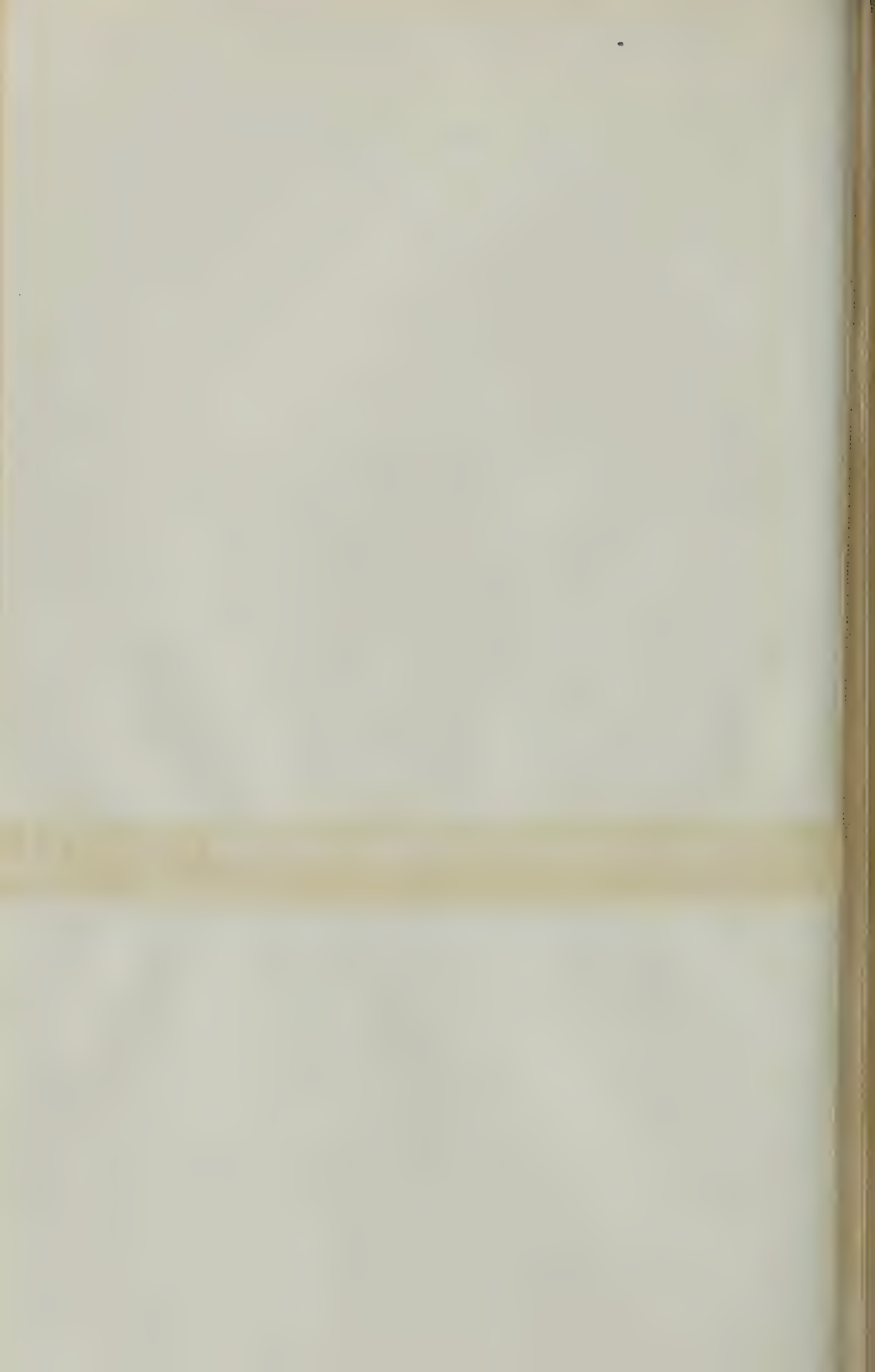
Witness further testified, referring to Defendant's Exhibit 19, that it would be impossible to ship the cross bracing shown on this set in any other way than as indicated, which calls for the single members being shipped separately.

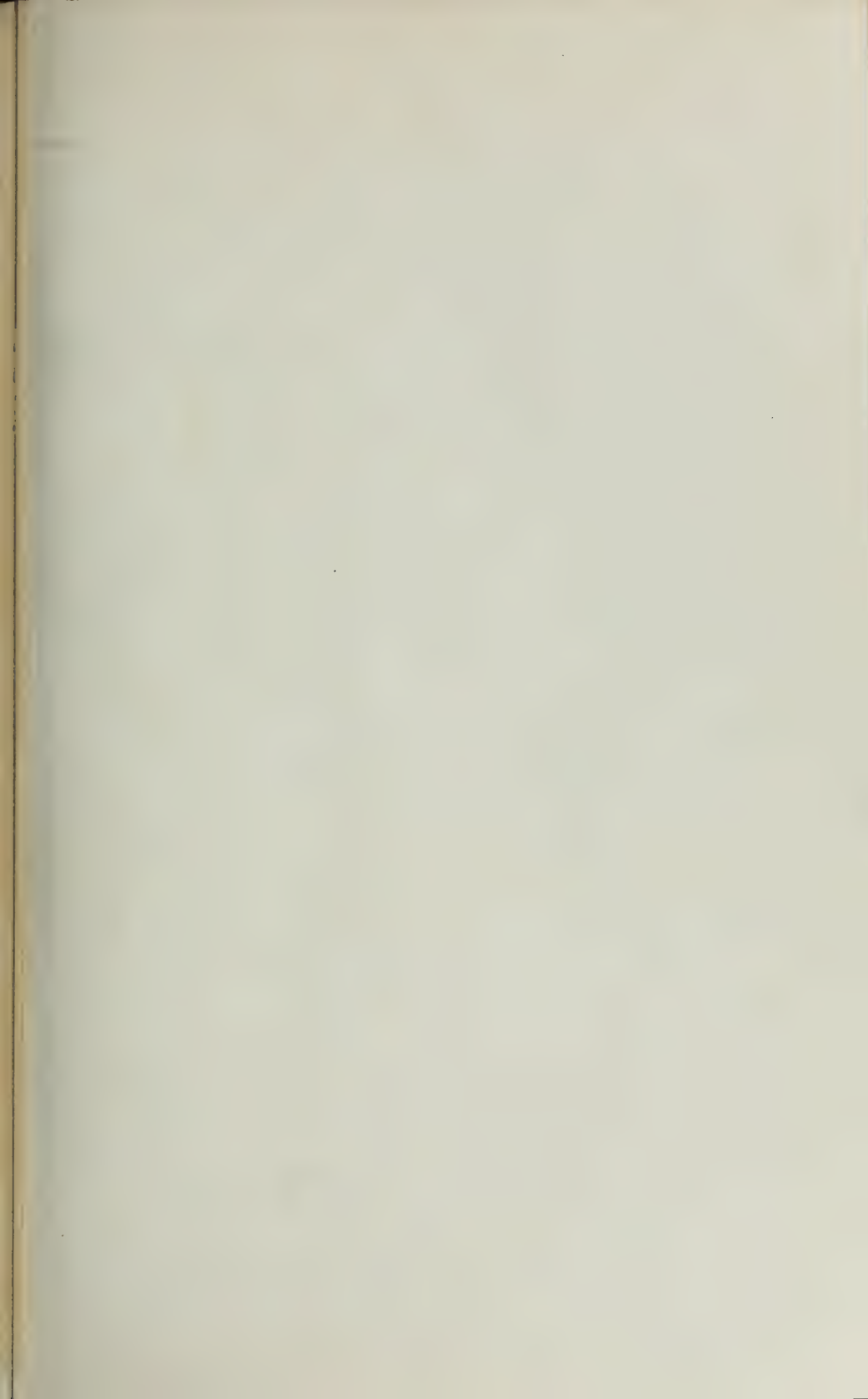
Witness further testified that the blue prints, known as Plaintiff's Exhibit "B" and Defendant's Exhibit 19, were simply picked by the witness at random out of the shop details examined by him, and that they illustrate the practice shown throughout the exhibits.

Witness thereupon testified that he was familiar with the general rules and requirements regarding the shipment of structural steel by water in ships between November 29th, 1912, and December 17, 1913, and understood that no extremely long pieces would be accepted by the steamship companies, except by special agreement, and that no units of such size or shape as to be easily injured in handling would be accepted; that the vessels reserved the right to charge by measurement on the basis of forty (40) cubic feet, equal to one (1) ton, at any time that the cost of freight arrived at in this way would be greater than the cost by actual weight.

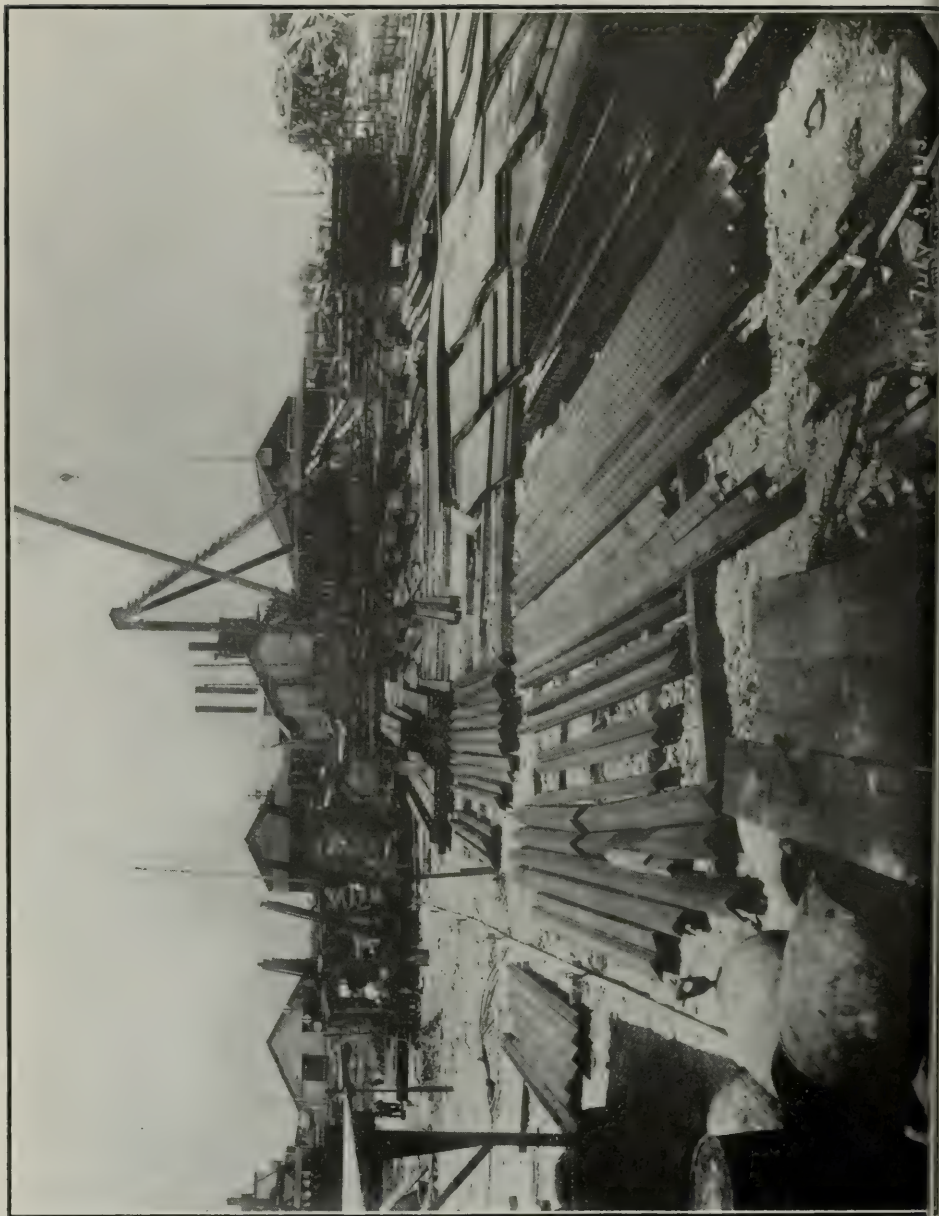
Witness further testified that he had never been





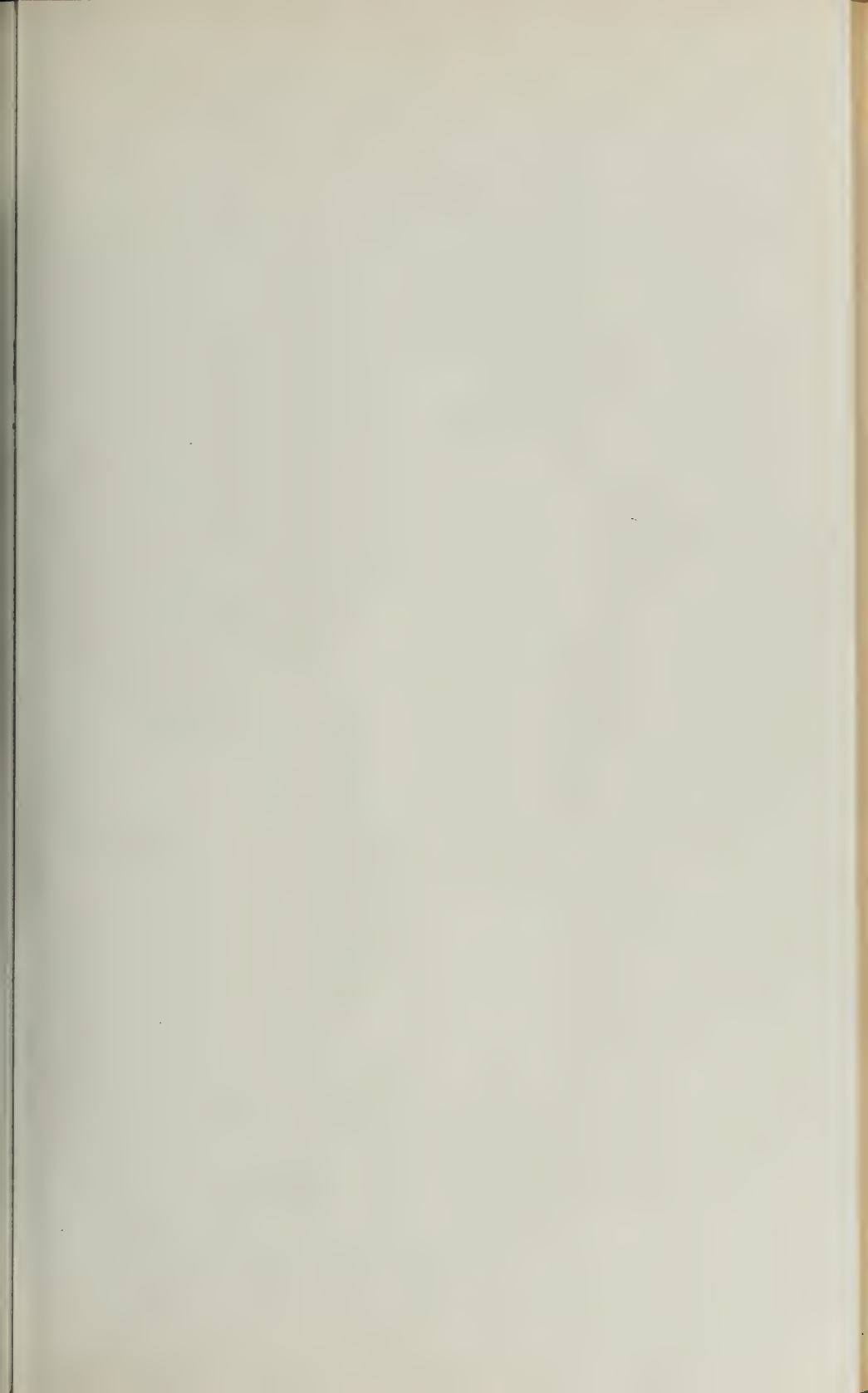


DEFENDANTS EXHIBIT C

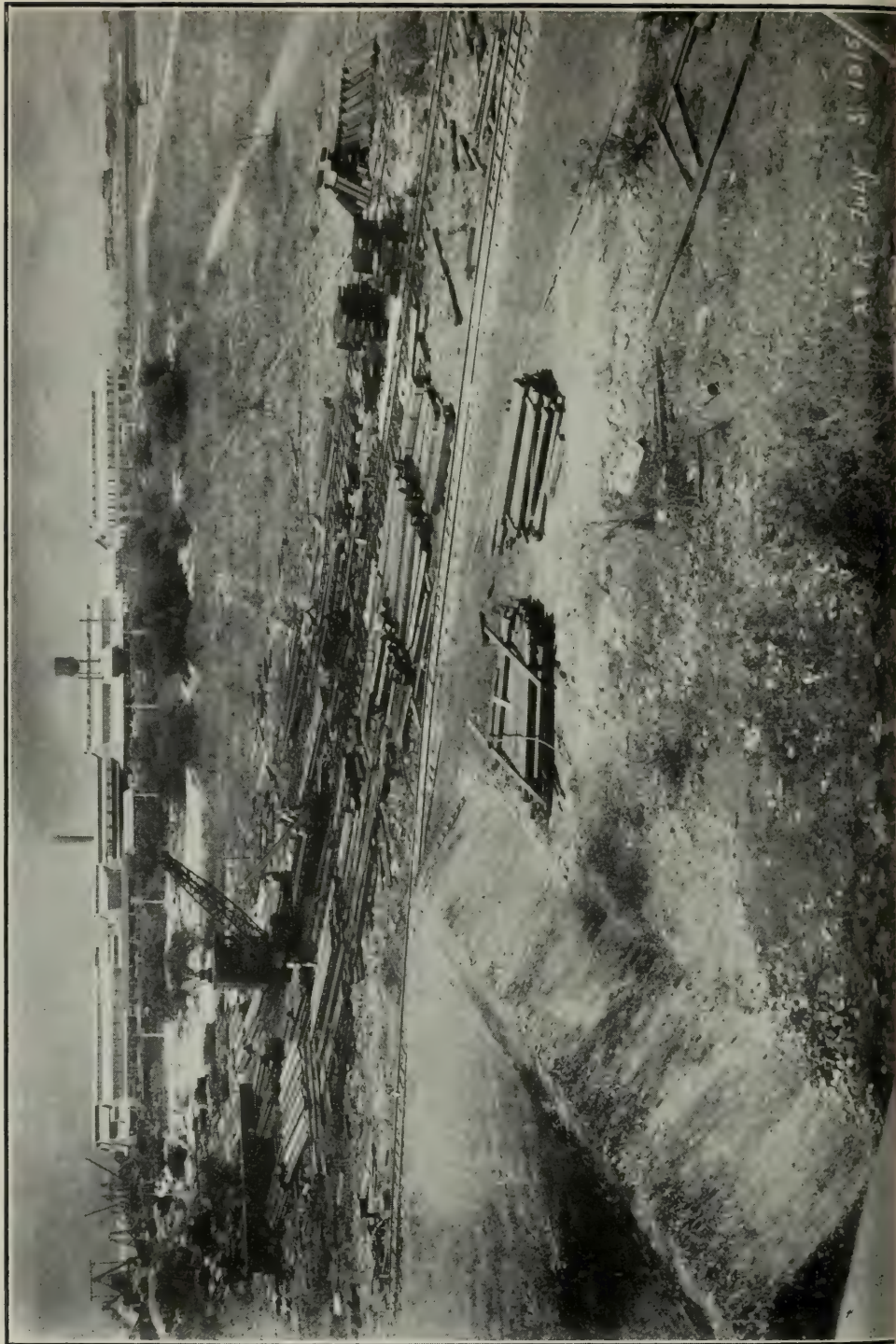


DEFENDANT'S EXHIBIT B.





DEFENDANT'S EXHIBIT A.



SLIDE 15 - 2000 - 11-11

(Bill of Exceptions—Deposition of G. Hindes.)

connected in any way with the construction work carried on by plaintiff company in Prince Rupert, and had no official or other connection with the plaintiff company or defendant company.

Thereupon defendant offered in evidence three photographs showing portions of the structural steel for the Pearl Harbor dry dock as it was received from the vessels, illustrating the testimony of Stetson G. Hindes in regard to there being a large amount of field riveting required in erecting water shipments.

To the introduction of these photographs, plaintiff objected for the reason that the steel shown thereon was for the erection of a pontoon dry dock in the Pearl Harbor dry dock in the Hawaiian Islands, and the claim in the particular case here was of steel for building of a dry dock at Prince Rupert.

Thereupon the Court overruled the objection, and the photographs were received in evidence, and marked "Defendant's Exhibits A, B and C."

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Thereupon the defendant offered in evidence the original specifications covering the work at Prince Rupert, and to the introduction of these specifications plaintiff objected on the ground that there was no testimony showing that the plaintiff company was familiar with these specifications or read them, and that there was no testimony to show that the bid of the plaintiff company was based entirely upon the specifications.

Thereupon the Court overruled plaintiff's objection, and the specifications were received in evidence and marked "Defendant's Exhibit 20."

(Defendant's Exhibit 20)

July 9th, 1912.

SPECIFICATION

No. 3

**FOR STEEL WINGS FOR A 20,000 TON FLOATING DRY
DOCK FOR THE GRAND TRUNK PACIFIC RAILWAY,
PRINCE RUPERT, B. C.**

**Frank E. Kirby,
William T. Donnelly,
Engineers.**

**17 Battery Place,
New York City, N. Y.**

This specification is to be considered in connection with the accompanying plans, Drawings No. W-1, W-2, W-3, W-4, W-6, W-7, W-8 and W-9 and

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Drawing No. P-10, M-6 and No. 9, forming part of same, and is intended to furnish such information as will enable those experienced in similar watertight steel work, to arrive at a clear understanding of the quantity, quality and kind of material to be used and the character and cost of the labor to be employed.

GENERAL DESCRIPTION.

The work consists of furnishing and erecting the steel wings for a pontoon floating dry dock of three sections, the wings to be 38' high, 15' wide at the bottom and 10' wide at the top, with the covering of the top extended 2', making an overall width at the top of 12'. The wings of the two end sections are each to be 133'-5" long and of the six pontoon section, 268'-5".

The framing will consist of 8" channels braced with angles, as shown on the plan, and these will be on 3' centers with a 3'-9 $\frac{1}{2}$ " space at each end of the wing. There will be two bulkheads of detailed construction as shown on the plan, in the short sections, and five bulkheads in the long section.

There will be twelve (12) standard manholes on the inside of each wing and six (6) doors for entrance on the deck of each wing, located as indicated on the plan.

WING ATTACHMENTS.

The attachment of the wings to pontoons will be by means of a link and wedges, a steel casting

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attached to pontoon at each frame and a structural steel fitting attached to wing. There will be 360 sets of these fastenings for each wing, of detailed construction, as shown on detailed plan Sheet No. W-2.

It will be understood that this contractor is to furnish these attachments complete, including steel castings secured to pontoons, and that he is to provide bolts, fit and secure in place the steel castings on the outside of pontoon and that he is to put in place the steel castings on pontoons at the inner side of wing, but that the rods for these castings will be furnished and put in place by the contractor building the pontoons.

This contractor is to furnish the pontoon builder with a template of the holes in these steel castings. This contractor will also furnish and fit links and steel pins with the necessary shims for covering any irregularity in length of links or position of fixtures.

PACKING UNDER WINGS.

During erection and fitting up, the contractor is to supply a packing of #10 steel plate, 14" wide, between wings and pontoons and upon completion of erection, the contractor is to replace this packing with 3-ply Canvas Belting thoroughly saturated with red lead putty, composed of red lead and linseed oil.

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WINGS.

The wings are to be covered with plating varying in thickness from $\frac{1}{2}$ to $\frac{5}{16}$ ", distributed as shown on the plan. On the outside of each side and each end of the wing and also on bulkheads, there will be stiffening angles of dimensions as shown on the plans.

OPENINGS AND REINFORCING.

Openings are to be cut through deck and bottom plating for machinery, as indicated on the plans, and are to be reinforced to make section of equal strength to uniform section of wing.

CONNECTIONS OF SECTIONS.

By referring to Sheet No. W-3, there will be seen the manner of connecting the different sections together. It will there be seen that across the abutting ends of the wings there is to be a triangular jaw and socket piece very strongly framed to the end of the wing, constructed of $\frac{3}{4}$ " plating. The interior of the attachment is to be filled solid with cement and on the inside and outside of the wings at this point there is to be a link attached, the link to be $4'-8\frac{1}{2}"$ between center of pins. The attachment of link at each end is to be by $8 \times 8 \times \frac{3}{4}$ angle iron reinforced by plate as shown.

It will be understood that these attachments are to be put on the abutting ends of the wings of the sections where they come together when the

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dock is assembled in one piece. They are designed to have a play or lost motion of 1 inch.

MOORING ATTACHMENTS.

By referring to Sheet W-6, there will be seen the manner of mooring the dry dock to the pier work. By reference to the diagrammatic sketch it will be seen that there are to be two of these attachments on each of the small sections and four on the large section. They are to be in the nature of a large jaw with removable piece for detaching when it is necessary to move the sections or the dock as a whole.

To distribute the strain, the interior frames of the wings are to be reinforced by 10" channels, as shown, and attachment is to be made from the outside to stiffening angles and additional angles where necessary.

All rivet heads, where they will come in contact with and slide on the shore member of mooring, are to be countersunk and chipped smooth.

This contractor is to supply and put in place rocking jaw of wood on steel work but owner will supply shore member of mooring.

GENERAL REQUIREMENTS.

The general requirements of the work to be performed are that it shall be of good marine, water-tight construction; that the framing and plating, together with the stiffening on the outside, shall be able to stand an external or internal pressure

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corresponding to a difference of 20 feet in water level. These requirements to apply equally to the interior bulkhead.

The riveting is to be on 3" and 6" centers, designed for multiple punching. All 6x6 corner angles to be double riveted; also, first streak top and bottom. All longitudinal plates to be butt joint with splice plate on the inside, double riveted. All caulking edges to be sheared and will be required to equal good outside ship work.

SUPERVISION OF CONSTRUCTION.

The design, construction and equipment of the floating dry dock is to be under the direct supervision of Frank E. Kirby or William T. Donnelly or their authorized representative. The term "Supervising Engineer" when used in this specification shall be understood to mean Frank E. Kirby or William T. Donnelly or their authorized representative.

During construction of the dock, the Contractor must provide for the ready access thereto at all times of the Supervising Engineer and facilitate the inspection of material and workmanship. It is to be clearly and distinctly understood that any material or workmanship which, in the opinion of the Supervising Engineer, is unsound, defective or otherwise unsatisfactory, such material and workmanship shall be removed and renewed by the Con-

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tractor to the entire satisfaction of the Supervising Engineer.

Failure or neglect on the part of the Supervising Engineer to condemn or reject bad or inferior work or material while the work is in progress, shall not be construed to imply an ultimate acceptance of such work or materials. No claim for delay will be allowed to the Contractor on account of loss of time due to the renewal of material or workmanship, which has failed to comply with the requirements of these specifications.

MATERIAL AND TESTS.

All materials used in the construction of the dock shall be of the best quality. To consist of open hearth plates and shapes throughout unless otherwise specified. Steel plates and shapes used in the construction of the dock must conform to the requirements in the tests prescribed in this specification and in all respects to be free from defects of any character whatsoever.

The inspection of material by any authorized official or society and the acceptance of materials by the Contractor and the subsequent working of such material into the structure shall not release the Contractor from responsibility and any material which, in the opinion of the Supervising Engineer is defective, must, upon receipt of notice in writing from the Supervising Engineer, be removed by the Contractor and replaced by material con-

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forming with the prescribed tests and requirements of this specification and to the satisfaction of the Supervising Engineer. Such expense as may be incurred, due to the purchase, removal and renewal of defective material or workmanship, is to be borne by the Contractor.

WEIGHTS AND MEASUREMENTS OF PLATES AND SHAPES.

Weights and measurements of plates and shapes to be in accordance with standard specification adopted by the Association of American Steel Manufacturers.

TESTS.

The physical requirements for steel used in the construction shall be a maximum tensile strength of 55,000 to 65,000 pounds per square inch and elastic limit equal to one-half the tensile strength—elongation to be not less than 23% in eight inches. Cold bending test to be 180 degrees flat—without rupture on the outside of bent portions. Rivet steel shall have a maximum tensile strength of 47,000 to 55,000 pounds per square inch and elastic limit equal to one-half the tensile strength. Elongation to be not less than 25% in eight inches.

CHEMICAL TESTS.

Phosphorus and sulphur limits for steel:

Acid open hearth steel shall not contain more than eight one-hundredths of one per cent of phosphorus and basic open hearth not more than five

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one-hundredths of one per cent. No steel shall contain more than five one-hundredths of one per cent of sulphur.

MILL TEST.

Copies of all mill tests and inspections are to be furnished the engineer in charge, without expense.

SHOP INSPECTION.

Access shall be given at all times to the engineer in charge of the work, or his authorized representative, to the shops where work is being laid out or assembled.

CAST IRON.

Iron castings shall be of the best quality of tough gray foundry iron and shall have a maximum tensile strength of not less than 18,000 pounds per square inch, free from blow holes and true to patterns and of good finish.

CAST STEEL.

Steel castings, after annealing, shall have a maximum tensile strength of not less than 60,000 pounds per square inch, with an elongation of not less than 15% in two inches. Cold bending test to be 90 degrees around three times their thickness and when red hot or over, 180 degrees flat, without rupture on outside of bent portions.

All steel shall be stamped with its cast number.

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RIVETING.

When practicable, holes are to be punched by multiple punch and the punching must be accurately performed in order to avoid the necessity of reaming unfair holes. Drifting holes must not be resorted to. When holes are to be countersunk, the countersinking must conform to United States Navy or Lloyd's Standard.

Exposed rivet points to be "snap" or "button." Any doubtful or unsound rivets are to be removed at once and no riveted joints are to be coated (paint or cement) until receiving the permission of the Supervising Engineer after satisfactory tests.

Generally solid liners to be used.

The bolting up or assembling of the structure to be performed in the most thorough manner and any irregularity of plated surface, due to riveting, will not be accepted. Before riveting any parts together, the faying surface must be thoroughly free from mill scale, grit, coal-ask, etc.

Contact surfaces and other surfaces not accessible after erection, to be coated with red lead and linseed oil.

COUNTERSINKING AND FLUSH RIVETING.

Countersinking and flush riveting shall be used wherever shown on the plans or called for in the specification; also, wherever required to avoid contact of rivet heads with attachments. Such rivets on outside of floor of wings as are in the wake of

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the wood packing pieces upon which the wings rest, are to be countersunk and chipped flush to give fair bearings on packing pieces.

BALLAST IN WINGS.

From a review of the material used in construction of the pontoons and the weight of the wings and mechanical equipment, it has been determined that there will be required approximately 550 tons of ballast to cause the dock to sink when it is entirely flooded with water. In providing this ballast, it has been seen fit to make a certain portion of it in the form of large timbers to be placed in the upper part of the wings, (See detailed sheet No.) in such a way that while it will act as ballast, causing the dock to sink to the greatest depth required, it will, when the dock has reached that point,, represent a form of reserved buoyancy of 500 tons of such a character as can be positively depended upon, thus preventing the entire submergence of the dry dock under any conditions.

The additional weight that will be required is to be supplied by this Contractor in the shape of stone ballast of clean, hard rock of such size as to be readily handled and to be placed either on the deck or in the interior of the pontoons as may be required by the engineer. The amount of stone ballast is not to exceed 500 tons for the entire dock.

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LADDERS AND INTERIOR GRATING.

Referring to Sheet No. W-7, there will be seen the detailed construction of ladders and interior grating along the interior of each wing. The opening through the deck for this entrance is to be 6'x2' wide, to be reinforced by a solid plate surrounding the opening and to have a substantial ladder of the construction shown, descending to the grating, which is to extend the full length of the wing, with openings at each bulkhead surrounded by substantial railing with access to vertical ladder on each side of bulkhead extending to the bottom of the wings.

MACHINERY HOUSE.

At the center of each wing there will be required a machinery house 21' long x 10' wide x 10' high; to be of substantial steel frame construction and to be covered with heavy galvanized iron. To have suitable doors and windows and reinforced frame over motor of sufficient strength to handle parts of a 200 H. P. Motor.

INTERIOR LADDERS AND DRAUGHT SIGNS.

On the inner side of each wing at each end of each pontoon there is to be a substantial ladder as indicated on Sheet No. W-7, for access from deck of pontoon to top of wing and adjacent to these ladders and at a point midway of the length of the longer section, there are to be draught boards painted white and plainly marked with

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figures in black to indicate the depth of water over the keel blocks. These draught boards are to be of detailed construction as shown on the plan and to be substantially secured to the side of the wings.

FENDERS.

At each end of each section of the dock there are to be substantial timber fenders of dimensions as shown on Sheet No. W-7, amply secured to the corners of the sections as guards for the entrance of ships.

DOWEL PLATES.

Referring to Sheet No. W-4 there will be seen the detailed construction of Dowel Plates and their application for accurately locating the pontoons in connection with the wings. A heavy bent plate $\frac{3}{4}$ " thick x 9" long is to be securely riveted to the bottom of the wing. This plate is to have a cut out in the horizontal portion and a superimposed 1" plate with hole for Dowel Pin, and is to be secured in place by four $\frac{3}{4}$ " tap bolts after the Dowel plate and pin have been let in and secured by through bolts to pontoon. These parts are to be put in place after the placing of the canvas packing under the wings when the pontoon and wing are secured together and in proper relative position. There will be four of these plates for each pontoon.

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PAINTING.

(A)

Shop Coat.

All material is to receive a thorough shop coat of Briggs' Tenax Bituminous Solution, this coating to be renewed wherever knocked off or destroyed during erection.

Field Painting.

After erection, the entire interior and exterior, including all bracing and framing and the outside of the bottom of the wings, are to be thoroughly cleaned and treated with two coats of Briggs' Tenax Bituminous Solution, applied by skilled workmen according to the specific directions of the manufacturers.

After the metal is thoroughly dry and under proper weather conditions, the interior below the grating near the top of the wings, including all bracing, stiffeners, etc., and also the underside of the bottom of the wings, with the exception of the marginal strip resting on the pontoons, is to be coated with Briggs' Ferroid Enamel, to be applied hot, not less than $\frac{1}{8}$ " thick.

This work is to be done by skilled workmen, the painting to be done according to the specific directions of the manufacturers and under the approval and control of the engineers and to their entire satisfaction.

The material is to be received on the ground from the manufacturers in unbroken, original pack-

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ages and no thinning or diluting of material will be allowed without the express permission and instruction of the engineers in charge.

(B) (Alternative Proposal)

Shop Coat.

All metal is to receive a thorough shop coat of Toch Bros.' TOCHOLITH and this coating is to be renewed wherever knocked off or destroyed during erection.

Field Painting.

After erection, the entire interior and the outside of the bottom of the wings are to be thoroughly cleaned and receive two coats of Toch Bros.' Bridge Cement, applied by skilled workmen according to the specific directions of the manufacturers.

After erection, the exterior is to be thoroughly cleaned and is then to receive two coats of Toch Bros.' R. I. W-49 of different shades, to be applied by skilled workmen under proper weather conditions and according to the specific directions of the manufacturers.

The material is to be received on the ground from the manufacturers in unbroken, original packages and no thinning or diluting of material will be allowed without the express permission and instructions of the engineers in charge.

ERECTION OF WINGS.

By referring to Drawing No. 1 there will be seen indicated by dotted lines, the berth for erection of

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wings alongside of Pier No. 1. It will be understood that this location is to be held available for mooring pontoons and erecting wings without charge to the Contractor, it being, however, understood that the Contractor is to make all provisions for mooring pontoons and handling his own material. Compressed air for riveting purposes will be available to the amount of 900 cu. ft. per minute and parties submitting bid are requested to state allowance which they will make upon their bid in case this amount of air is furnished by the owners.

By referring to Sheet No. P10 there will be seen the manner of securing the pontoons together, which method has been used for a previous erection. It will be seen to consist of a number of beams or stringers bridging the space between the pontoons, one set above and one set below, and drawn together with a heavy tie rod, blocking of varying thickness being placed under the timbers to give an even bearing when sprung upon the pontoons. It is to be noticed that a small block is to be used between the pontoons to regulate the spacing. The Contractor may adopt this or other approved method, which must be submitted to the engineers and whatever method is adopted for erection it must maintain the pontoons in sufficient alignment to allow for building the wings straight and correctly located.

It will be understood that the wooden pontoons

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upon which the wings are to be erected will be delivered to the steel contractor alongside the pier on the company's property, as shown on Drawing No. 1, previously referred to, and that the time of erection of the material under this contract is to commence when the first three pontoons have been delivered. After the erection of the wings on the first three pontoons has been completed, an additional three pontoons of the second or central section of the dock will be delivered to this contractor and immediately upon the delivery of the second set of pontoons, the erection of the wings of the middle section of the dock, comprising six pontoons, is to be commenced. The third set of three pontoons will be delivered as soon as completed to this contractor, and the erection of the wings of the last section of the dock, composed of three pontoons, will commence upon the turning over of these pontoons by the pontoon contractor.

It is further understood that each section of the dock, after the completion of the erection of the wings, will be secured in its permanent location by this contractor.

The contractor bidding on this work is to state the time he will require for completing the erection of the wings for the first, second and third sections of the dock after the pontoons have been delivered to him. This contractor is to be responsible for the mooring and care of the pontoons and wings until the erection is completed and the sections se-

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cured in their permanent moorings, when the responsibility for the care of the dock will be taken over by the owners, it being understood, however, that acceptance and final payment will not be made until the dock has been completely equipped and tested for requirements under this specification; that is, that the structure is to remain watertight and withstand a difference of inside and outside water-level of 20 ft.

PLANS AND SPECIFICATIONS.

This specification and the accompanying plans form part of the contract and are intended to represent the conditions and requirements for the completed work and are not to be interpreted to mean that any omissions or variations in plans and specifications shall afford the contractor opportunity to evade such conditions and requirements as are intended to be covered.

The plans and specifications shall not release the contractor from the responsibility of performing every detail of the work in a manner thoroughly satisfactory to the Supervising Engineers. Such plans and stress diagrams as form part of the contract and these specifications are to be taken as a guide by the contractor in preparing strength calculations for the details.

Prior to ordering materials from the manufacturers for use in construction of the wings, the contractor must check for the Supervising Engineers, the calculations made by the engineers to

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determine the size of scantlings indicated on the plans accompanying this specification. These check calculations to form a base of comparison with present diagrams and a check on maximum stress on the wing structure due to a difference of water pressure equal to 20 ft. head. In the event of such check calculations indicating excessive stress local or structural, modifications shall be made as required by the Supervising Engineers in order that the stress for working loads shall not at any point exceed six tons per square inch. Such results shall not, however, be used for the reduction of any net section as called for.

The contractor may submit to the Supervising Engineers for consideration, plans suggesting changes in dimensions of plates and shapes which may expedite the construction of the dock. Any variation in scantlings must reduce the stress. Plans are to be accompanied by statement in writing in explanation of the advantages to be obtained by the adoption of proposed modifications. No increase in stress above mentioned is permissible.

Before proceeding with any part of the work, details of the same are to be submitted to the Supervising Engineers for approval. All details submitted must show clearly the location and size of rivets in the structure and all fittings connected to hull properly.

Such copies of working plans as the Supervising

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Engineers may require are to be furnished by the contractor.

Specifications, tracings, prints, diagrams, etc., used in connection with the construction of the work or in connection with the design or equipment, whether prepared by the contractor or manufacturer, all such plans, test sheets, diagrams, etc., will be the property of Frank E. Kirby and William T. Donnelly, Engineers, 17 Battery Place, New York, N. Y.

The contractor further agrees that under no consideration will the plans, templates, moulds or prints, etc., above mentioned, be used for the construction of any other dock than that authorized by Frank E. Kirby and William T. Donnelly and each print shall have distinctly marked thereon, "The property of Frank E. Kirby and William T. Donnelly, Engineers, 17 Battery Place, New York."

All details and special fittings involving patterns and dies, are to have one complete set (spare) prepared, available for immediate use and stored by contractor and considered part of this contract.

BMS.

All bids for this work should be submitted to the General Purchasing Agent, GRAND TRUNK PACIFIC RAILWAY, MONTREAL, CANADA, and made out in duplicate.

Parties desiring to furnish and erect this material will state:

1st—A price per ton for furnishing and erect-

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ing all the material on the Company's property at Prince Rupert, B. C.; the contractor to furnish all facilities for handling and erecting the material and a compressed air supply for riveting of not less than 900 cu. ft. of free air per minute at 90 lbs. pressure per sq. in.

2nd—A lump sum price to be allowed in case the Company furnishes the contractor with 900 cu. ft. of free air per minute at 90 lbs. pressure per sq. in. for riveting.

3rd—A separate price for painting all metal according to the specifications (A) and (B) under heading of PAINTING on pages 10 and 11 of this specification.

4th—The time required for the fabrication and complete delivery of all material in Prince Rupert, B. C.

5th—

(A) The time required to erect the wings on the first section of three pontoons.

(B) The time required to erect the wings on the second section of six pontoons.

(C) The time required to erect the wings on the third section of three pontoons.

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July 6th, 1912.

SPECIFICATION

No. 21

FOR STRUCTURAL STEEL AND IRON WORK FOR

SHIPBUILDING SHED

GRAND TRUNK PACIFIC RAILWAY,

PRINCE RUPERT, B. C.

Frank E. Kirby,

William T. Donnelly,

Engineers,

17 Battery Place,

New York, N. Y.

This specification, together with the accompanying drawings No. 8, No. B-23, B-24, B-25, and B-26, B-32 is intended to convey to those familiar with this class of structure, such information as will enable them to arrive at a clear understanding of the kind and quantity of material and labor necessary to complete the work as herein called for, in the best and most thorough manner.

GENERAL.

The work to be provided by the contractor is to include the supplying and erecting of the structural steel and iron work for the shipbuilding shed as herein enumerated.

(a) Main columns, trusses and eyebars (10 in all).

(b) Crane runway, extension columns and ties (4 in all).

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(c) Roof girders, purlins and longitudinal members.

(d) Crane girders and rails.

(e) Cross bracing and sway bracing.

(f) Anchor bolts, anchor plates and beams.

BASIS OF ESTIMATE.

The contractor is to state his price per ton for supplying and completely erecting the entire structural steel and iron work, as shown on the plans and outlined herein. He is also to state his estimated total weight of the material to be furnished.

DRAWINGS.

Detail and shop drawings of the entire work are to be prepared by the contractor agreeable to the plans submitted and in accordance with the directions of the engineers. These drawings are to be submitted to the engineers and are to receive his approval before the work is started and when approved, three (3) complete sets are to be furnished to the engineers for their use.

GENERAL REQUIREMENTS.

Cast iron shall be tough gray iron, free from injurious cold shots or blow holes, true to pattern and of workmanlike finish.

Structural steel shall be of uniform character for each of the specified kinds. It shall be made of the order section, shall be free from surface defects

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and shall not vary from the standard weight by more than $2\frac{1}{2}\%$.

Structural steel shall be of two kinds, medium and rivet steel and all shall be made in accordance with the standard specifications of the American Association of Steel Manufacturers.

All of the work shall be manufactured so as to fit with the best degree of precision.

Bearing surfaces of all base castings, sole plates and ends of columns are to be accurately machine-faced. All plates and angles shall be straight when laid out, and all built members, when finished shall be free from twists, kinks or open joints between component members, and any material defective in this respect will not be passed for erection until remedied in a manner satisfactory to the engineers.

All rivet holes may be punched, but no punch shall exceed the diameter of the rivet that is to follow it by more than $1/16"$ nor shall any die exceed the diameter of the punch by more than $1/16"$.

The depth of the rivet heads will be three-quarters the diameter of the rivets and the diameter of the heads one and five-eighths times that of the rivets. They shall be driven by power wherever possible. They shall be uniformly heated to a bright red heat and upset so as to completely fill the holes and finished with a hemi-spherical surface. All loose or imperfect rivets shall be cut out and tight

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and perfect rivets substituted for them to the satisfaction of the engineers.

All work assembled for riveting shall be thoroughly bolted together before riveting and at short intervals so as to prevent parts from springing apart and the rivets upsetting between them.

All pin holes must be accurately bored at right angles to the axis of members. Diameter of pin holes shall not exceed diameter of the pins by more than $1/32"$. Eye-bars must be straight before boring and the holes must be accurately centered in the head and bar. All eye-bars belonging to the same panel, when placed in a pile, must allow the pin at each end to pass through at the same time without forcing. No welds will be allowed in eye-bars. All eye-bars must be bored. Thimbles and washers must be used wherever required to fill vacant spaces on pins and pilot nuts must be provided to protect threads when driving pins.

PAINTING.

All steel and iron must be cleaned of mill scale, dirt, rust or oil before receiving the shop coat. It is then to receive a shop coat of iron Oxide paint made up with pure raw linseed oil and Japan. No "bung-hole" dryers or boiled oil will be allowed. The pigment shall be natural Iron Oxide and shall contain at least 70% of $Fe_2 O_3$.

In the case of all rivet work, the surfaces coming in contact, the bottom surfaces of bed plates

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and all parts not accessible for painting after erection shall be painted with two coats of the same iron oxide paint.

After the structure is erected, all mud and dirt is to be removed, all abrasions in the first coat of paint must be brushed with a stiff wire brush and then touched up with the iron oxide paint. The entire structure is then to receive two field coats of carbon paint suitably tinted for distinction. The carbon paint shall be made up with pure raw linseed oil and Japan, no boiled oil or "bunghole" dryers will be allowed. The carbon pigment shall be gas carbon or a similar preparation containing not more than 50% of silica, free from acids and ground fine.

Field painting must be done only on a sunny day and the use of benzine or mineral oils will not be allowed. The paint is to be carefully, thoroughly and evenly applied with a brush so as to cover the entire surface and be well worked into all interstices. No painting shall be done in freezing weather and not until the preceding coat is thoroughly dry.

DESIGN.

In the design of the structure, the contractor is to use the loadings scheduled on Drawing No. B-23 and proportion the various members in accordance with the following unit stresses:

Tension—16,000 lbs. per sq. in. net section.

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Transverse—16,000 lbs. per sq. in.

Compression—(15,200-58 1/r) lbs. per sq. in.

Plate girders:

Tension—14,000 lbs. per sq. in. net section.

Compression—14,000 lbs. per sq. in. net section.

Shear—8,000 lbs. per sq. in.

Eye-bars—16,000 lbs. per sq. in.

Pins (bending)—18,000 lbs. per sq. in.

Anchor Bolts—20,000 lbs. per sq. in. at root of thread.

MAIN STRUCTURE.

The general framing of the building is shown on Drawings No. 8, No. B-23 and B-26. The sizes and strains shown are approximate only. All necessary anchor bolts and plates are to be furnished by the steel contractor and set by the Masonry Contractor. In a general way, the design shown must be followed but the contractor may make such variations to suit his shop practice as may be approved by the engineers.

BIDS.

Parties bidding on this work will submit a price per ton for furnishing all labor and material and erecting same on the site at Prince Rupert, B. C.

Bids are to be made out in duplicate and addressed to Mr. J. H. Guess, General Purchasing Agent, GRAND TRUNK PACIFIC RAILWAY, MONTREAL, CANADA.

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These specifications and plans are the property of Frank E. Kirby and William T. Donnelly, Engineers, 17 Battery Place, New York, N. Y., and are to be used for the purpose intended and no other.

SPECIFICATION

No. 6

FOR THE POWER STATION FOR THE
GRAND TRUNK PACIFIC RAILWAY,
PRINCE RUPERT, B. C.

Frank E. Kirby,
William T. Donnelly,
Engineers,
17 Battery Place,
New York, N. Y.
July 13, 1912.

SPECIFICATIONS

ACCOMPANIED BY DRAWINGS FOR A POWER STATION
TO BE ERECTED AT PRINCE RUPERT, B. C.

BEING A PART OF CONTRACT SIGNED BETWEEN

..... CONTRACTORS

AND

THE GRAND TRUNK PACIFIC RAILWAY.

1, GENERAL.

Whenever the word "Contractor" is used herein, it shall be understood to refer to party or parties preparing to perform the work as herein described.

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Whenever the word the "Company" is used herein, it shall be understood to refer to The Grand Trunk Pacific Railway.

Whenever the word "Engineer" is used herein, it shall be understood to refer to Frank E. Kirby and William T. Donnelly, Engineers.

2, CONTRACT NOT TO BE ASSIGNED.

The Contractor shall not assign, sub-let or transfer the whole or any part of the contract, or any interest therein, without the written consent of the Engineer being first obtained.

3, BOND.

The Contractor is to give to the Company, at the time of the execution of the contract, a good and sufficient bond with a surety company, as surety, as shall be satisfactory to the Company in the penal sum of Ten Thousand (\$10,000.00), conditioned on the full and complete performance by the Contractor of all the works and matters contracted for to be kept or performed by the Contractor.

4, DATES ON WHICH THE WORK IS TO BE COMPLETED.

It is to be mutually understood and agreed between the Contractor and the Company that the entire work herein described and shown on the drawings, shall be completed in accordance with the specifications and plans, and to be in good condition, ready for operation on or before the first day of.....

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6, METHODS AND APPLIANCES.

The Contractor is to employ such methods and appliances for the performance of all the operations connected with the work as will secure a satisfactory quality of work and a rapid rate of progress.

If at any time such methods or appliances appear to be inefficient or inappropriate, the Engineer may order the Contractor to increase their efficiency or to improve their character, and the Contractor must conform to such order; but the failure of the Engineer to demand such increase of efficiency or improvement shall not relieve the Contractor from any of his several obligations.

6, SHEDS, STOREHOUSES, ETC.

The Contractor is to include the building of such sheds, or other protections, as will be necessary for the work and the protection of materials, but the location of such structures must be such as not to interfere with the work of other Contractors.

The Contractor is to provide ample and efficient toilet arrangements on the premises, properly partitioned off, for the mechanics and laborers employed on the several works during their construction, and he is to guard against any nuisance in any part of the building. The temporary toilet arrangements are not to be removed until directed by the Engineer.

7, DEFECTIVE WORK.

Defective work and material may be condemned

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by the Engineer at any time before the final acceptance of the work, and when such work has been condemned it shall be immediately taken down by the Contractor and rebuilt in accordance with the plans and specifications. When defective material has been condemned, it shall be removed from the building and stored, or otherwise disposed of at the direction of the Engineer.

In case the Contractor shall neglect or refuse to remove or replace any rejected work or material within the time designated by the Engineer, such work or material is to be removed or replaced by the Engineer at the Contractor's expense.

8, EMPLOYMENT OF SUPERINTENDENT OR FOREMAN.

The Contractor is to employ and retain at the building, from the commencement of the work until its entire completion, a competent superintendent or head foreman (irrespective of any foreman employed by any sub-contractor), who shall see that the work is properly executed. Copies of all plans and specifications are to be in the possession of the superintendent, or head foreman, at all times. Instructions given to the superintendent, or head foreman, by the Engineer shall be considered as having been given to the Contractor, and the head foreman shall have power to execute such instructions.

9, FAILURE TO CONDEMN INFERIOR WORK.

Failure or neglect on the part of the Engineer to condemn or reject bad or inferior work or mate-

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materials while the work is in progress shall not be construed to imply an ultimate acceptance of such works or materials.

10, COMPLIANCE WITH ALL LAWS, ORDINANCES, ETC.

It is to be further understood that in all the operations connected with the work herein specified, that all laws, ordinances, rules and regulations controlling or limiting in any way the action of those engaged in the work or affecting the methods of doing the work, or materials applied to it, must be respected and strictly complied with by the Contractor or his agents. The Contractor is also to provide all necessary gate-keepers, watchmen, fencings, struttings, shorings, bridgeways, lights, signals and protections, and all other matters as may be necessary, or may be deemed necessary by the Engineer, for the due protection and security of the works, and for the protection and the safety of the public and of all buildings and property whatsoever, near to, or liable to be affected by the works. The Contractor shall also afford the utmost facility for public or private transit in respect to any roads or rights of way or rights of traffic which may be interfered with by the execution of the works.

11, PROVISION THAT THE CONTRACTOR SHALL PROTECT WORKS, PROPERTY AND PERSONS FROM INJURY.

The Contractor is to take every necessary, proper, timely and useful precaution against accident

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or injury to the works, or to any property, or to any person, by the action of pressure of water, whether the same shall arise from or be occasioned by floods, springs, rain, disruptions, leakage, frost or otherwise, and also against all other accident or injury to such works, property or persons, whether from wind, fire, tempests or from any other natural or artificial cause whatsoever, and whether arising from the execution or non-execution of the works. The Contractor is furthermore to forthwith repair, make good and defray any loss, damage or cost by or in consequence of any accident, or by or in consequence of the operation, whether negligent or not on the part of the Contractor that may be occasioned to the Company or City or to any person or persons injuriously affected thereby.

The Contractor is to defend at his own cost and expense any suit or suits at law that may be brought against the Company by reason of accident to any person or persons, or by reason of any neglect or oversight on the part of himself or his employees, or by reason of any damage done to adjoining properties, and he is also to assume and pay for any and all damages that may arise from any cause by reason of doing or not doing any part of the within described work.

12, NOTICES TO BE SERVED BY THE CONTRACTOR.

The Contractor is to give all notices required by any law or statute, or as directed by the Engi-

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neer, to give due and sufficient notice to all companies, such as water, gas, or other companies, and also to all City officials or to their respective departments having charge of the water or other pipes, or of the drains, sewers, highways, pavements and the like, previous to and at the completion of any work, in order that the proper persons may be enabled to attend and see that the pipes, sewers, highways, pavements and the like are secured, relaid, reinstated in a proper and satisfactory manner; and also in order that the proper persons representing the water, gas and other companies may be enabled to attend and secure, shore up, alter the position of, remove, relay and reinstate the pipes, mains, plugs and any other water, gas or other works, belonging to the city of government or to private corporations or persons.

13, *WORK TO BE DONE IN ACCORDANCE WITH TRUE
INTENT AND MEANING OF DRAWINGS AND SPECIFICATIONS.

All work described in these specifications, or shown on the drawings, to be executed to the true intent and meaning of said specifications and drawings.

14, CHARGE FOR EXTRA WORK.

If it should be found desirable that any alterations be made in the plans and specifications, the same shall be brought to the notice of the Engineer,

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and the cost thereof shall be determined before any contract is made for such work.

No charge for extra work will be allowed unless previously ordered in writing by the Engineer, and the cost of all extra work is to be determined on before the same is commenced and stated in the written order.

15, DRAWINGS AND SPECIFICATIONS TO SUPPLEMENT EACH OTHER.

It is further stipulated that these specifications and drawings are intended to supplement each other, so that any work shown on the drawings and not described in the specifications, or *vice versa*, is to be executed as if it were described in these specifications and set forth in the drawings.

16, FOREMAN AND WORKMEN TO BE SATISFACTORY TO THE COMPANY.

The Engineer may, by written notice, require the Contractor to dismiss forthwith any superintendent, foreman or workman he deems incompetent or careless, or a hindrance to the proper progress of the work.

17, PROVISION FOR THE PROMPT DELIVERY OF MATERIAL.

The Contractor must arrange for the prompt delivery of all material as needed, and he must at all times have a sufficient number of men on the work who shall act promptly in conjunction with

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the workmen of all other contractors, in order that there may be no delay in the erection and completion of the work.

18, LOCATION AND SIZE OF BUILDING.

The building is to be located near the center of the property as shown on the general location plan No. 1.

The construction will be substantially 132'-0" by 148'-0" and will consist of an operating room approximately 148'-0"x50'-0", with provision for three electrical units, two air compressors, switchboards and the necessary auxiliary apparatus, offices, lockers, etc.; a boiler room of approximately the same dimensions with provision for four boiler batteries of 8000 square feet of heating surface each and an economizer supported above them on the steel work; a chimney 11'-0" inside diameter by 175'-0" high with its flue system, and an emergency coal storage with the standard gauge railway track for supplying the fuel to the storage as well as the regular clam steel bucket supply.

19, EXCAVATION AND PUMPING.

The excavation for the foundations of the power house will be done by another contractor and this contract shall start from a grade one foot above the high water level. All concrete waterproofing and other constructions below this line will be done by another contractor.

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20, CONCRETE FOUNDATION WORK.

The concrete for the *entire foundation work up to and including Grade 13'-0"* shall be compared by measure of one part of Portland cement, three parts of clean sharp sand, and five parts of gravel or broken stone of a size that will pass in every way through a ring 2 inches in diameter. The stone or gravel shall be screened to remove particles smaller than $\frac{3}{4}$ inch and washed clean. The cement shall be.....Portland cement manufactured by the.....Co. The cement and sand shall be thoroughly mixed dry, the proper quantity of clean water shall then be mixed in, and the clean moistened stone added to the mass and the whole to be thoroughly mixed. The amount of water added shall be such as to assure a monolithic mass of concrete. The mixing of the concrete is to be done by a mixing machine, wherever possible, or as directed by the Engineer. Plank and timber curbs must be furnished by the Contractor, to confine the concrete in the shape and dimensions called for by the drawings; the concrete is to be laid in sections and in horizontal layers not exceeding two feet in thickness and must be wet enough that ramming may not be necessary. The concrete is to be well puddled and spaded next to the form with proper tools. Before any weight is placed on concrete, it must have as much time to set as can be conveniently allowed, and in no case less than 24 hours. All water used in making

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concrete and mortars must be fresh and clean; salt water is not to be employed. The Contractor is to block up under all main floor girders with concrete for the support of all of the main floor framing.

The Contractor is to furnish and erect a complete wooden form (or mould) for each part of the foundation, and the exposed surfaces of the concrete foundation work and walls are to be finished smooth.

All finished work to have planed forms.

21, CONCRETE WALLS.

The building walls shall be of concrete composed by measure of one part Portland cement, two and one-half parts of clean sharp sand and four parts of broken stone or gravel passing through a 1 inch mesh screen. The mass is to be confined in planed plank forms well wired and braced and laid in horizontal layers not exceeding 2 feet in height. The concrete is to be mixed in a machine satisfactory to the Engineer and must be so wet that, when well spaded against the forms, a solid wall with a good solid surface will be obtained. The inside of the forms shall be free from dirt, shavings or other foreign matter and shall be well soaped before pouring. The forms shall remain in place at least seven days after pouring.

Air holes or other unsightly places in the wall after the removal of the forms shall be cut out and patched and at the conclusion of the work the walls

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both inside and out shall be given a skim coat of neat cement applied with a brush.

22, FRONT AND SIDE STEPS.

The steps for the front and side entrances shall be constructed of concrete proportioned as for the foundation walls. The ballustrade walls shall be carried down to rock at the high water level. The steps shall be reinforced with two $\frac{1}{2}$ inch round steel rods to a step extending six inches into the wall on either side. The treads, risers, and platform in front of the door shall be given a $1\frac{1}{2}$ " granolithic finish, stained dark slate with lamp black and trowelled to a surface.

23, BASEMENT FLOOR.

The Contractor is to finish off the basement floor at elevation $+2'-10\frac{1}{2}$ " with a struck finish over the entire area of the operating room and such portion of the boiler room as are shown on the basement drawing No. F-6. Over these areas after the walls have been built and all machinery foundations and steel works installed, a $1\frac{1}{2}$ " granolithic finish is to be laid, well trowelled to a hard surface at elevation $+3'-0"$.

24, MAIN FLOOR ARCHES.

The Contractor is to provide the main floor arches for the areas in the engine and boiler rooms as shown on the plans. These arches in the engine room are to consist of six inch slabs of concrete

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reinforced with triangular mesh, wire cloth, or steel rods, the slabs to be surfaced 3 inches higher than the upper flange of the floor beams, El +13'-4½" the reinforcing to be continuous over the beam flange or lapped the full width of the flange. Suitable angle or cast iron curbs for all openings will be provided and set by the steel contractor. Over these arches a granolithic finish 1½" thick is to be laid well trowelled to a hard surface at Elevation +13'-6".

The arches over the ash runway in the boiler room shall be segmental arches 4" thick at the crown reinforced with expanded metal or wire mesh and struck level with the top flange of the beams. The arches for the areas at the sides of the boilers and between the center batteries shall be similar to those in the engine room. The areas at the back of the boilers shall be flat slabs reinforced as before four inches thick, cast in plank curbs in lengths not exceeding 24 inches and put in place afterwards. The upper surface of these blocks shall be trowelled smooth. Two 1½" sling holes shall be provided in each slab and joints shall be provided where the blow-off pipes pass downward. Suitable curbs will be provided around the stair well by the steel contractor. No arches will be provided for the economizer floor.

All floor arches shall be poured 1-2-1½-4 concrete as provided for the building walls.

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25, ASH PITS.

Eight ash pits are to be constructed by the Contractor as shown on the general plan and detail drawings. These ash pits are to be lined with 6 inches of 1-3-5 concrete laid on the fill and trowelled to a smooth finish on the upper surfaces.

Suitable ash door will be provided by another contractor but the Contractor will set them.

26, FILLING.

The Contractor is to fill in the areas under the boilers, the ash pits, the area between the ash runway wall and the outer boiler room wall, the area for the emergency coal storage and the area under the standard gauge track beyond the chimney. Over all these areas after the fill has been compacted the Contractor is to lay a six inch layer of concrete well trowelled to a smooth surface. That portion between the ash runway wall and the boiler house wall is to have a 1½" granolithic finish, well trowelled.

27, FINISH AROUND STOKERS.

After the rails and steel hoppers for the chain grate stokers have been installed that portion of the boiler house floor which is still unfinished is to be brought up to elevation 13'-4½" with concrete and a 1½ inch granolithic finish laid well trowelled to a smooth surface.

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28, FOUNDATIONS FOR MACHINERY.

All foundations for machinery, including the base for the chimney, shall be constructed of 1-3-5 concrete as provided for Foundations. Suitable plank frames well braced shall be provided and the concrete shall be laid in layers not exceeding 2 feet in thickness well spaded near the faces.

All anchor plates and bolts, provided by another contractor shall be set by template made by the Contractor and accurately aligned. The top surfaces shall have a struck finish 1 inch below the finished height to allow for grouting. After the machinery has been set, leveled and wedged up in the correct position the Contractor is to grout the joint with 1 to 1 Portland cement grout.

29, CARPENTER WORK.

Furnish strong fir centers for erecting the floor arches, and also for all arched windows and door openings. Centers shall be constructed of 2 inch planks laid close together and dressed on one side.

Centers are to be left in position until all masonry has set.

All cutting, jobbing, etc., that may be required shall be done, and all iron anchors, straps, bolts, etc., that may be required in connection with carpenter work, shall be furnished by the Contractor.

All door and window openings shall be provided with temporary doors and sash as may be directed.

All finished work shall be protected with planks.

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Furnish all grounds, furrings, brackets, etc., and provide all grounds for metal flashings, gutters, etc., and all blocking required to secure any portion of the other work of the building.

Furnish complete and substantial rough hardware for all temporary work throughout the building.

DOORS.

The outside doors to main entrance shall be $2\frac{3}{4}$ inches thick, the lower panels to be solid and provided with raised panel mouldings; the upper panels shall be glazed; jambs shall be 2"x8" with $1\frac{1}{2}$ x $21\frac{1}{2}$ " jamb stops securely fastened to jambs, which in turn shall be securely connected to the concrete walls; doors to be weather rabbeted at meeting rails; trim shall be a moulded and mitred back band trim 6" wide.

All other outside doors shall be $2\frac{1}{2}$ " thick with five solid panels, and provided with raised panel mouldings; jambs shall be 2"x8" with $\frac{5}{8}$ "x $21\frac{1}{2}$ " moulded jamb stops; panels shall not be less than $1\frac{1}{4}$ " thick; trim shall be a moulded and mitred back band trim 6" wide.

All interior doors shall be 2" thick with two solid panels with raised panel mouldings; upper panels, including transom over doors, shall be glazed; jambs shall be 2"x8" with $\frac{5}{8}$ "x $21\frac{1}{2}$ " moulded jamb stops; transom sash over doors shall be $1\frac{3}{4}$ " thick and shall be pivoted at sides; transom

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bars to be moulded 2"x7" in size; trims shall be moulded and mitred back band trims 6 inches wide.

WINDOW FRAMES AND SASH.

The window frames and sash shall be constructed as per the following: Sash to be 2½" thick, sills 2½" thick rabbeted, pulley stiles 1⅞" thick, inside and outside casings 1" thick, back lining 1" thick, and outside staff mouldings 1¼"x1¾".

All frames shall be set plumb and shall be kept well braced during the construction of the walls.

30, GLAZING.

The upper panels of toilet room door, including the transoms above, shall be glazed with a first quality maze wire glass ⅜" thick.

All other work throughout, including the exterior double hung sash, transoms, door panels and side lights shall be glazed with a first quality polished plate wire glass ⅜" thick.

All glazing shall be well bedded and puttied.

31, HARDWARE.

All interior doors to be hung on 6 inch loose pin steel butts—one pair to each door; the outside doors to be hung on 8 inch loose pin bronze butts—one pair to each door.

Boiler room outside doors to be hung on heavy approved "Reliance" overhead steel ball-bearing hangers, provided with steel tracks securely fastened to wall; these doors are also to be provided

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with steel roller door guards on floor at side jambs. The outside swing doors to be provided with "Blouts," or equivalent overhead liquid door checks of bronze complete. The outside doors shall be provided with extra heavy handles with plate escutcheons and cylinder locks. All interior doors, except as otherwise specified, to be provided with approved adjustable transom and sash openers of bronze. All double hung sash to be hung on "Queens" (or its equivalent), 2½" overhead pulleys with chains and cast iron weights, and to be provided with approved sash lifts and fasteners of bronze. The doors to stalls in toilet rooms shall be provided with nickel-plated brass spring hinges, door pulls and inside slide bolts; the slide bolts are to be connected to slotted nickel-plated outside name plates with the words "Occupied" and "Not Occupied" in white celluloid with black letter. The slate partitions in toilet rooms are to be supported on turned nickel-plated legs with wide floor flanges, and all slate partitions shall be fastened to backs by means of nickel-plated fittings throughout. All doors shall be provided with keys. All hardware shall be complete in every respect and satisfactory to the Engineer.

32, ROOF OF ENGINE ROOM.

To the 9" purlins of the engine house roof the Contractor is to bolt a 5"x4" fir spiking piece and over these are to be laid the roof of 2" tongued and

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grooved Douglass fir surfaced on both sides and well nailed to the spiking pieces. Two courses of roofing proper is then laid nailed with galvanized nails and tin protectors over which the roofing slate is to be applied or Keasby & Mathesson asbestos shingle. The Contractor is to state in his proposal which material he will use and submit samples.

33, ROOF OF BOILER HOUSE.

The boiler house roof will consist of flat slabs of 1-2 $\frac{1}{2}$ -4 concrete mixed as for the building walls reinforced with wire mesh, expanded metal, or similar material and 3" thick.

These slabs are to be joined in place on plank forms or centers with a struck finish on the upper side.

The entire surface of the roof is to be leveled up with a coat of sand and Portland cement for the application of the roofing; over the foregoing lay full five thicknesses of a good quality of roofing felt, lapping each successive layer at least two-thirds of its width over the preceding layer; firmly secure the felt with tins or cleats in a manner customary in the best composition roofing, and thoroughly mop the surface of each layer with a thin coat of a first class quality of roofing cement, in no case to be applied hot enough to injure the woolly fibre of the felt; over the entire surface of the felt thus applied spread a good surface of roofing cement, amounting in all, including what is used between the layers of felt, to not less than 10

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gallons of cement per 100 sq. ft. heated as hereinbefore specified. Completely cover the same with a coating of slag, using no slag larger than that which will pass through a $\frac{5}{8}$ inch mesh, and none smaller than that which will be caught by a $\frac{1}{4}$ inch mesh; the slag to be free from sand, dust and dirt, and is to be applied perfectly dry, and while the cement is hot. The roofing is to be properly graded to outlets as shown. All walls, bulkhead, economizer room and pipes passing through roof, etc., are to be thoroughly flashed and counter flashed with 20 oz. copper, secured in a proper and workmanlike manner; all flashing to be laid not less than 6" under felt, and is to extend well up on all walls, pipes, etc.

The economizer house is to be extended over the engine house roof with a wooden construction substantially as shown on the plans. The walls of this construction and the economizer house are to be covered with expanded metal or ferroniclese securely wired to girts as nailed to the furring and plastered with 1" of 1 to 2 Portland cement mortar well clinched. The roof of the economizer house and extension is to be covered with expanded metal or ferro-inclose and plastered with $2\frac{1}{2}$ " of 1-2 Portland cement mortar well clinched. This roof is not to be felted. A suitable cement cornice and drip is to be built up of expanded metal and cement securely wired to the steel work.

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34, GUTTER AND TREADERS.

A suitable 20 oz. copper gutter is to be installed on the front side of the building. On the rear the engine house roof will drain to the boiler house roof and a suitable 20 oz. copper gutter and flashing will be provided along the rear wall sloping to a gooseneck at each corner. There will be four 6" cast iron soil pipe leaders, 2 on the front of the building on the outside and 2 in the rear corners of the boiler house on the inside. The back leaders shall be connected to a 12" terra cotta sewer running to the front of the building where connections shall be made with the front leaders and the drain pipe enlarged to 16" shall then be carried to a point above the discharge tunnel and connected to it in a light and workmanlike manner. This sewer pipe shall also be used for the drain from the toilet rooms.

35, CORNICE.

A concrete cornice as per detail shall be constructed along the front of the building which shall be extended as a string course entirely around the building.

The walls at the gable ends shall be stepped off and all wall capped with a 3" course of concrete projecting 2" either side of the wall, the upper and outer surfaces of which shall be trowelled smooth.

36, APPROACH TO ASH RUNWAY.

The Contractor shall construct an approach to

(Bill of Exceptions—Defendant's Exhibit 20.)

ash runway as shown on the plans. The walls supporting the track girders shall be carried down to high water level and shall be at least 18" thick. The base concrete and side walls shall be 12" thick. The parapet walls shall extend three feet above the finished ground level and all exposed surfaces shall be trowelled to a smooth hard finish.

37, STEEL WORK.

The Contractor will prepare and struck finish all column bases for the reception of the steel work to the neat height required by the plans. He will set all necessary anchor plates and anchor bolts and after the steel work is in place with grout and flush all joints, seats, and other places where steel and concrete may come in contact.

The Contractor will furnish and set all reinforcing metal, wall anchors and will set all other iron work such as curbs, sills, corner guards, etc., embedded in concrete which is not fastened to the steel work and erected by another contractor.

38, PAINTING.

All woodwork is to be pruned before erection. After completion it is to be given three coats of white lead and oil in colors as selected by the Engineer. The underside of the engine room roof is to be given two coats of varnish. All exhaust metal work, both steel and cast iron, is to be painted two coats of lead and oil in colors as selected by the Engineer. All steam and other piping, after

(Bill of Exceptions—Defendant's Exhibit 20.)

covering, is to be painted two coats of paint in colors to agree with the standards for power station work as shown by sample on file in the office of the Engineer.

39, OFFICES, LOCKERS AND TOILETS.

In the locations shown on the plans the Contractor will construct an office, locker room, store room and toilet room. The walls will consist of 4 inch concrete 10'-0" high slabs moulded in place. The roof will consist of a 3" concrete slab reinforced with suitable girders also reinforced. This roof will be strong enough to carry a load of 150 lbs. per square foot besides its own weight. The ceilings will not be plastered but will be washed down with Portland cement as provided for the walls.

The locker room will contain ten expanded metal ventilated lockers 16"x18" inside provided with hasps and padlocks (Yale & Towns make). The store room will be partitioned off from the lockerroom by a $\frac{1}{8}$ " wire $1\frac{1}{2}$ " diagonal mesh wire partition strengthened with 2" channels and extending up to the ceiling. This partition shall contain a wire door of similar design with wicket, Yale lock and heavy hinges. The store room shall be provided with 80-12" square by 16" deep sheet steel compartments and two sets of eight sheet steel shelves on pipe standards, shelves to be 8'x2' each. Two galvanized iron waste cans with self closing fireproof tops shall be furnished.

(Bill of Exceptions—Defendant's Exhibit 20.)

Toilet room shall be provided with four wash basins, two urinals and three closets.

Water closets to be a syphon closet of one piece white vitreous porcelain with recessed flushing rim at back provided with low down cabinet finished oak cistern and oak seat. Cistern lined with 20 oz. copper and furnished with nickel-plated push button flushing release and removable cover.

Cistern shall be provided with all necessary valves and shall be connected with 1½ nickel-plated flush pipe.

Urinals to be one piece porcelain urinal with brass trap and push button flush valve. Cistern to be cabinet finished oak lined with 20 oz. copper 12"x12"x20" in size provided with all proper valves. Each urinal to have separate cistern wash basins to be one piece porcelain 22"x24" with nickel-plated waste trap and mountings, cold water compression faucet—no hot water fixtures.

All fixtures shall be supplied with separate stop valves with detachable handles.

Soil pipe to be 6" heavy cast iron soil pipe with oakum and lead joints, well caulked and fastened to wall with substantial iron fastenings. This pipe is to be trapped and discharged into the 12" terra cotta sewer before mentioned. All traps to be vented through a four inch vent pipe carried up three feet above the roof.

Water shall be taken from the water service pipe

(Bill of Exceptions—Defendant's Exhibit 20.)

near the center of the station in a 2" galvanized iron pipe.

Proper cleanouts and traps are to be installed where required and the entire plumbing job to be tested in the presence of the Engineer before acceptance.

The backs for the wash bowls shall be slate 2'-6" high above the bowl. The backs and partitions for the urinals shall be 1" slate 5'-0" high and 11½" slate floor 24" wide shall be provided under them. The toilet rooms shall be built of 1" slate 6'-0" high set 6" above the floor on nickel-plated supports. Toilet room doors to be 11½" quartered oak five paneled with raised mouldings. Doors to receive 1 coat of filler and 2 coats of varnish of approved quality.

40, CAST AND WROUGHT IRON WORK.

All outside doors shall be provided with cast iron sills of section as shown on the details. Two sets of cast iron stairs with anti-slip removable treads will be furnished and installed, one in the boiler house and one in the engine room, and the hatchways shall be provided with 6" curbs and iron pipe railings of substantial construction. Suitable curbing and railing shall be provided for the roof of the office and toilet rooms, and a wrought iron ladder for access to the cage of the crane and the toilet room roof. All openings greater than 4' shall be provided with steel lintels of suitable

(Bill of Exceptions—Defendant's Exhibit 20.)

strength and the soffits of all openings over 10' wide shall be reinforced with steel rods as well as lintels. Lintels and the reinforcing shall be put in place before that portion of the wall is poured.

41, CLEANING UP.

At the completion of the work the Contractor is to leave the entire plant broom-clean and ready for operation. All rubbish is to be dumped where directed by the Engineer.

42, LINING FOR STEEL STACK.

The Contractor is to furnish and lay the red brick lining for the 175'-0" steel stack. This lining is to be a 4" common brick wall laid on the angle supports provided on the inside of the stack and backed with 1" of a 1-3 mitred of Portland cement mortar and lime mortar.

BIDS.

Parties desiring to do this work will state prices as follows:

(a) Lump sum price for furnishing all labor and materials necessary to complete the work as herein called for in the most thorough and approved manner.

(b) The Contractor will state the shortest time required to complete the erection of the Power Station as called for and described herein.

(c) Bids are to be made out in duplicate and addressed to Mr. J. H. Guess, General Purchasing

(Bill of Exceptions—Defendant's Exhibit 20.)

Agent, GRAND TRUNK PACIFIC RAILWAY,
MONTREAL, CANADA.

These plans and specifications are the property of Frank E. Kirby and William T. Donnelly, Engineers, 17 Battery Place, New York, N. Y., and are to be used for the purpose intended and no other.

July 12th, 1912.

SPECIFICATION

No. 24

FOR THE SUPER-STRUCTURE (EXCLUSIVE OF THE
STRUCTURAL STEEL) FOR THE SHIPBUILDING
SHED FOR THE
GRAND TRUNK PACIFIC RAILWAY,
PRINCE RUPERT, B. C.

Frank E. Kirby,
William T. Donnelly,
Engineers,
17 Battery Place,
New York, N. Y.

This specification, in connection with the accompanying plans, Drawings No. B-27, B-28 and B-29, is intended to convey to those familiar with this class of wooden building construction, such information as will enable them to arrive at a clear understanding of the quality and quantity of materials to be used and the character and cost of the labor involved to complete the work as called for

(Bill of Exceptions—Defendant's Exhibit 20.)

herein in a first-class manner and to the entire satisfaction of the engineers in charge of the work.

GENERAL.

The work to be provided by the Contractor is to include all materials and labor of whatever nature requisite for completing and finishing the superstructure of the Shipbuilding Shed (with the exception of the structural steel framing) starting from the finished first floor level. All construction below this grade is covered by another contract.

This contract is to include all wooden sills, studs, posts, purlins and other framing, covering boards, roofing, windows, doors, gutters and leaders, painting, hardware, flashings and fastenings, skylights.

BASIS OF ESTIMATE.

The Contractor is to state his lump sum price for supplying and completing the building as shown on the plans and outlined herein.

BOND.

The Contractor is to give to the Company, at the time of the execution of the contract, a good and sufficient bond with a surety company, as surety, as shall be satisfactory to the Company in the penal sum of.....Thousand (\$.....) Dollars, conditioned on the full and complete performance by the Contractor of all the works and matters contracted for to be kept or performed by the Contractor.

(Bill of Exceptions—Defendant's Exhibit 20.)

DATE ON WHICH WORK IS TO BE COMPLETED.

It is to be mutually understood and agreed between the Contractor and the Company that the entire work herein described and shown on the drawings, shall be completed in accordance with the specifications and plans, and to be in good condition, ready for operation on or before the first day of.....

DEFECTIVE WORK AND MATERIALS.

Defective work and materials may be condemned by the Engineers at any time before the final acceptance of the work, and when such work has been condemned it shall be immediately taken down by the contractor and rebuilt in accordance with the plans and specifications. When defective materials have been condemned they shall be removed from the building and stored, or otherwise disposed of at the direction of the Engineers.

In case the contractor shall neglect or refuse to remove or replace any rejected work or material within the time designated by the Engineers, such work or materials are to be removed or replaced by the Engineers at the contractor's expense.

PROVISION THAT THE CONTRACTOR SHALL PROTECT WORKS, PROPERTY AND PERSONS FROM INJURY.

The contractor is to take every proper, necessary, timely and useful precaution against accident or injury to the works or to any property or to any

(Bill of Exceptions—Defendant's Exhibit 20.)

person, by the action of pressure of water, whether the same shall arise from or be occasioned by floods, springs, rain, disruptions, leakage, frost or otherwise, and also against all other accident or injury to such works, property or persons, whether from wind, fire, tempests or from any other natural or artificial cause whatsoever, and whether arising from the execution or non-execution of the works. The contractor is furthermore to forthwith repair, make good and defray any loss, damage or cost by or in consequence of any accident, or by or in consequence of the operation, whether negligent or not on the part of the contractor, that may be occasioned to the Company or city or to any person or persons injuriously affected thereby.

The contractor is to defend at his own cost and expense any suit or suits at law that may be brought against the Company by reason of accident to any person or persons or by reason of any neglect or oversight on the part of himself or his employees, or by reason of any damage done to adjoining properties, and he is also to assume and pay for any and all damage that may arise from any cause by reason of doing or not doing any part of the within described work.

CHARGE FOR EXTRA WORK.

If it should be found desirable that any alterations be made in the plans and specifications, the same shall be brought to the notice of the Engineers

(Bill of Exceptions—Defendant's Exhibit 20.)

and the cost thereof shall be determined before any contract is made for such work.

No charge for extra work will be allowed unless previously ordered in writing by the Engineers, and the cost of all extra work is to be determined on before the same is commenced and stated in the written order.

DRAWINGS AND SPECIFICATIONS TO SUPPLEMENT EACH OTHER.

It is further stipulated that these specifications and drawings are intended to supplement each other, so that any work shown on the drawings and not determined in the specifications, or vice versa, is to be executed as if it were described in these specifications and set forth in the drawings.

CARPENTER WORK.

All wood used in this construction shall be Douglas Fir and only dressed lumber of best standard grade in each class shall be used. The contractor shall set the 4" x 6" sills, as shown on the plans, on temporary blocking on the long side of the building and on the wooden floor for the ends of the building. On these sills the 3" x 10" studs are to be framed and well spiked. Studs at door are to be doubled with a 4" x 10" extra stud well spiked. Corner posts, two 3" x 10" studs well spiked. Columns for second floor to be 12" x 12" set on first floor and their feet held in place with 2" x 4" cleats. Caps

(Bill of Exceptions—Defendant's Exhibit 20.)

8" x 12", braces 6" x 8" framed and bolted with $\frac{3}{4}$ " bolts; stringers, 12" x 16" spliced on column tops. 4" x 12" floor joists, 25" c. to c. Balloon stringer, 2" x 12" on side with 10" x 12" posts in end walls to be chambered on all four edges, $\frac{3}{4}$ " wide. 4" x 12" plank well spiked. All posts, stringers and floor joists and floor to be surfaced all over. All columns to be chamfered on all four edges, $\frac{3}{4}$ " wide. 4" x 12" rafters spaced as shown and bolted to the steel pur-lins with $\frac{3}{4}$ " bolts and well spiked to studs. Headers beneath windows 3" x 4" and above windows 3" x 6" and 4" x 8". Headers above doors, 10" x 12". Headers for skylights, 3" x 12". Siding to be $1\frac{1}{4}$ " novelty siding surfaced both sides. Roof to be covered with $1\frac{1}{2}$ T. & G. boarding surfaced on under side. Corner boards to be $1\frac{1}{4}$ " x 5" clear stuff surfaced both sides with 2" quarter round at corner, as per detail. All cornice trim and moulding work to be of the detail and scantling shown on the plans and to be of clear stuff throughout.

WINDOWS.

All 2-sash windows to be double hung, 2-sash, 9-lights each, $10\frac{3}{4}$ " x $15\frac{1}{8}$ " double thick glass, well tacked and puttied. Frames to be of $1\frac{1}{4}$ " stuff, as per detail; sills to be $2\frac{1}{2}$ " x 8"; sash $1\frac{3}{4}$ " thick with $\frac{1}{2}$ " parting bead and $1\frac{3}{4}$ " moulded stop bead. Inside sill and apron $\frac{7}{8}$ " x 4".

Side windows in second floor to be single sash fixed, 9-light, glazed with $10\frac{3}{4}$ " x 15" double thick

(Bill of Exceptions—Defendant's Exhibit 20.)

glass. Sash $1\frac{1}{2}$ " thick with $1\frac{1}{4}$ " frames. 2" x 8" sill and moulded stop bead.

SKYLIGHTS.

Skylight frames to be $2\frac{1}{4}$ " x 12" and 3" x 16" with 4' sash and glazed with 14" x 4'-0" double thick ribbed glass, all moulded, flashed and hung as per details.

DOORS.

All doors to be 3" thick, framed and glazed as per details. Door frames of $1\frac{1}{2}$ " and $1\frac{1}{4}$ " stuff with suitable cap and water-shed.

FASTENINGS AND FLASHINGS.

The contractor will furnish all fastenings such as bolts, anchors for attaching the wood framing to the steel or to itself. All flashing shown or needed including the ridge-roll, shall be of No. 20 galvanized iron.

GUTTERS AND LEADERS.

The contractor will furnish and place two lines of 8" galvanized iron gutter No. 18 gauge, properly supported with galvanized hangers and supports. The gutter on the rear of the building will be provided with four goosenecks and 4" leaders of No. 20 galvanized iron properly supported and leading to within 6" of the ground level. All leaders must be securely supported with galvanized supports.

(Bill of Exceptions—Defendant's Exhibit 20.)

HARDWARE.

Sash weights—Cast iron of sufficient weight.

Sash pulleys

Hangers for doors

Handles for doors

Locks for doors

Bolts for doors

Skylight hinges

Skylight lifters

} Heavy pattern and substantial design, subject to the approval of the Engineers.

PAINTING.

All outside woodwork is to be painted with three good coats of white lead and pure linseed oil properly tinted to meet the approval of the engineers. All flashing shall be painted with one heavy coat of metallic paint before being put in place.

ROOFING.

Parties desiring to do this work are to submit prices per 100 sq. ft. of roofing as follows:

(a) Slate roof layed over two thicknesses of roofing paper, well secured with galvanized iron nails and tin protectors.

(b) Keasbey & Mattison Co. Asbestos Shingles or equal, layed over two thicknesses of roofing paper and well secured with galvanized iron nails through tin protectors.

(c) H. W. Johns-Manville Co. 3-ply, J.-M. Asbestos Built-up Roofing, built up, applied and secured in strict accordance with the specifications of the Company.

(Bill of Exceptions—Defendant's Exhibit 20.)

Parties submitting prices as called for, may at their own discretion, submit as additional bids, other equal quality of roofing, but in doing so must submit full specification giving detail construction of roofing. No alternative, however, will be considered unless prices are first given upon the kind and quality of roofing called for on Page 6 of this specification.

BIDS.

Parties desiring to perform this work will submit prices as follows:

(a) Lump sum price for all material and labor and the erection of same, exclusive of the roofing.

(b) Price per 100 sq. ft. for roofing as called for on Page 6 of this specification.

(c) State the shortest time necessary to deliver all the materials herein called for at Prince Rupert, B. C.

(d) State the time required for completing the erection after the completion of the erection of the steel framing.

(e) Bids are to be made out in duplicate and addressed to Mr. J. H. Guess, General Purchasing Agent, GRAND TRUNK PACIFIC RAILWAY, MONTREAL, CANADA.

These plans and specifications are the property of FRANK E. KIRBY and WILLIAM T. DON-

(Bill of Exceptions—Defendant's Exhibit 20.)

NELLY, Engineers, 17 Battery Place, New York, and are to be used for the purpose intended and no other.

Thereupon the defendant, to sustain the issues upon its part, offered in evidence the deposition of one W. N. CONCANON, taken according to stipulation, in the City and County of San Francisco, State of California, and in the Northern District of California, on the 29th day of September, 1916, before Eugene W. Levy, a Notary Public in and for said State, County and District, which deposition was taken upon written interrogatories, in answer to which witness testified as follows:

**(Deposition of W. N. Concanon for
Defendant)**

Witness testified that he was a constructing engineer at 525 Market Street, San Francisco, California, residing at 601 Fifty-fourth Street, Oakland, California; that he had been engaged in his present occupation for thirty years, ten years president of the W. N. Concanon Construction Company; that he graduated from the A. Van der Naillen School of Engineering; that, as president of the company and acting as its general manager, he had been required to estimate construction work and to manage the execution of contracts, all of which had required him to be thoroughly familiar with general construction and engineering practice in con-

Bill of Except'ns—Deposition of W. N. Concanon.)
nection therewith; that he had built the steel cantilever ship building crane at Mare Island, California, a structure with six hundred (600) feet runway and eighty-five (85) feet above ground, a cantilever crane above it, and a steel saw mill at Mare Island, steel foundry building, steel machine shop, steel boat shop, steel and corrugated iron machine shop, steel and concrete store house, steel and concrete quay walls, also ten (10) wireless telegraph stations for the United States Navy Department with steel and wooden masts on the Pacific Coast from San Diego to Prince William Sound, the General Naval Hospital at Puget Sound Naval Station, seven (7) steel industrial buildings at Pearl Harbor Naval Station, and steel and concrete store house and administration building at Pearl Harbor, also quarantine buildings at Honolulu, and numerous bridges, Court Houses and jails and smaller structures at various points on the Pacific Coast, of all of which he had been contractor and general manager and with the details of which he was familiar; that he had also built the car houses for the Southern Pacific Company at Albina, near Portland, Oregon, and was familiar with all classes of general construction and contract work.

Witness further testified, in connection with the extent to which structural steel is fabricated in the shop before shipment when shipment is to be made by boat, that owing to the placing and storing of fabricated structural steel, either on deck or in the

(Bill of Except'ns—Deposition of W. N. Concanon.)

hold of ocean vessels, where the material is subjected to pressure of the different members, in addition to their constant movement during transit caused by rough weather, the fabricated steel during such transportation is subjected to the pitching, rolling and working of the ship, often causing severe damage to it; that for that reason the shop drawings are prepared so as to eliminate the riveting of all projecting parts which would be subject to being torn off or broken from such causes, and the length and projections prohibited by common carriers, besides being subject to a much higher tariff from being rated by the cubic measurement of the material instead of by weight, and unnecessarily increasing the cost of shipment; that the usual practice is to complete each member, including gusset plates on the same, when gusset plates are comparatively small, leaving all struts and other members to be riveted to the gusset plate in the field, for the reasons previously stated.

Witness further testified that structural fabricated steel, when shipped by rail, is usually riveted as nearly complete as possible, each member of the structure being subject to the necessary riveting in the field to connect it to each other member when it is erected and in all cases controlled by the regulations of the railroad in reference to length of members, clearances for bridges, tunnels, etc.; that fabricated structural steel shipped by water is usually knocked down, so as to avoid damage in

Bill of Except'ns—Deposition of W. N. Concanon.)

transit; that owing to the size of vessels and their latches and other necessary restricted shipping regulations, it is usually necessary to ship fabricated members knocked down and of much more limited size and shape than if transported by rail; that the principal reason, however, for limiting the size and shape of fabricated members and leaving them knocked down was, as already stated, the danger to which they would necessarily be subjected when transported by water.

Witness further testified, that the shop drawings are followed absolutely in fabricating structural steel, and control the fabrication of the various members as to sizes, shapes and connections, and also indicate the number and position of the rivets, and whether they are shop or field driven; that each member is marked by letter and number on the drawing corresponding with the mark on the fabricated member. Witness further testified that the customary and usual manner of preparing such shop details is employed when the same are to be used in fabricating such structural steel, as is involved in this case, for shipment by water transportation; that in the fabrication of structural steel for water shipment, the shop drawings are so designed that they comply with the rules and regulations of the different shipping concerns as to length of members, angular projections, to be attached by rivets to each piece, and a due precaution on the part of the shipper to provide against unreasonable

(Bill of Except'ns—Deposition of W. N. Concanon.)

damage to the ship which is entailed by the loading, discharging and unavoidable movement of the material on the vessel in rough weather.

Witness further testified that he had carefully examined the specifications, original designs, and shop details covering the power house, the ship shed, the machine shop, boiler and blacksmith shop, foundry and coal storage buildings, prepared by the American Bridge Company for the defendant company for use in constructing and erecting the buildings of the Grand Trunk Pacific Railway at Prince Rupert, British Columbia, and understood them clearly; that he considered that these shop details show the customary and usual amount of fabrication for water shipment, and that they were designed in the customary manner; that he had erected about ten thousand tons of steel at various places, subject to shop drawings made for water shipment, and knew from experience that in some instances no gusset plates were riveted on main members, and in general were less favorable to the erector than in this work; that he had examined the shop drawings previously referred to for the Prince Rupert work, and found that, according to his judgment, the fabrication and riveting was carried on and completed as fully as could have been expected by any contractor.

Witness further testified, referring to Defendant's Exhibit 11, that plate P-1 and plate P-2 on column JS-1 showed a gusset plate all riveted in the

(Bill of Except'ns—Deposition of W. N. Concanon.)

field in accordance with the shop drawing; that it would have been imprudent to rivet these plates to the columns in the shop for the reason that when stowed in the hold of a vessel under hundreds of tons stored on top of the plates, independent of the column, they would probably have been badly damaged; that on the same column the plates having a comparatively small projection are shown riveted in the shop.

Witness further testified, referring to Plaintiff's Exhibit "C", that on strut JK-1 the plate is riveted to the strut in the shop, although the plate is of such dimensions (though smaller than plate P-1 on Defendant's Exhibit 11) as to endanger its safety in transit; that this was probably done on account of the inaccessibility of the rivets which the erector could not reach, and to a pin hole which might become misplaced.

Witness further testified, referring to Plaintiff's Exhibit "P", that, in his opinion, it is exceedingly dangerous to ship assembled trusses by water, although this might be done in rare instances.

Thereupon, in response to a question as to whether or not the witness was familiar with the rules, regulations and requirements in ships between November 29th, 1912, and December 17, 1913, governing the manner of loading and transporting for export in or aboard vessels of structural steel, to which question plaintiff objected on the ground that it was incompetent, irrelevant, and immaterial, and

(Bill of Except'ns—Deposition of W. N. Concanon.)

indefinite in not being limited to show whether or not it covered the general custom or simply the custom of the defendant company, or of the American Bridge Company, which objection the Court overruled, witness further testified that he could not retain in his memory the many and intricate rules or shipping regulations governing shipment of structural steel upon any particular date; that when he had occasion to ship structural steel, he took each separate consignment and got direct advice upon the subject.

Witness further testified that he was not connected in any way with the operation or management of any of the work carried on by plaintiff company at Prince Rupert, British Columbia, and that he had never had anything to do with either party to this action, except that when he could not get an order of steel cheaper from anybody else, he would sometimes give the defendant company an order.

Thereupon the defendant, to sustain the issues upon its part, recalled as a witness one FRANK EDWARD FEY, who having been already duly sworn, testified as follows:

**(Direct Examination of Frank Edward Fey
Recalled for Defendant)**

Witness testified, referring to Plaintiff's Exhibit "P", concerning which W. N. Concanon had

(Bill of Exceptions—Testimony of Frank E. Fey.)

testified that it was exceedingly dangerous to ship assembled trusses by water, that said Plaintiff's Exhibit "P" showed a truss shipped knocked down; referring to Plaintiff's Exhibit "C", and to the pin hole shown thereon, which had been mentioned by W. N. Concanon, that the surrounding plates, as well as the large gusset plates, were shown riveted to the main member or the strut on account of the pin hole connection; that these plates were assembled in the shop and riveted, and then the pin hole was drilled, and that after that operation was completed, there was an absolutely true pin hole through all these plates; that the reason for riveting the gusset plate to the main member was that, by riveting the plates and then drilling the pin holes, an absolutely perfect pin hole was secured at perfect right angles to the main member; that this certainly could not have been done as readily if it had been left to be driven in the field; that furthermore, in this instance, the whole load carried by the strut was transmitted to this pin, so that, if the bearing between the metal and the pin were not absolutely true, something would be liable to buckle or cramp. Witness further testified, referring to Defendant's Exhibit 19, concerning which Stetson G. Hindes had testified that it would be imprudent to ship the cross bracing shown thereon in any other way than as indicated, that the bracing showed went between the bottom chords of the trusses to keep the trusses in their proper align-

(Bill of Exceptions—Testimony of Frank E. Fey.)

ment and absolutely true and vertical; that the large gusset plate was fastened onto the bottom chord of the truss, and that the bracing was fastened to the bottom chord of the truss, and that, according to the drawing, brace angles, the strut, the gusset plate, and all were shipped loose.

Thereupon the defendant, to sustain the issues upon its part, called as a witness one CHARLES C. OVERMIRE, who was duly sworn and testified as follows:

**(Direct Examination of Charles C. Overmire
for Defendant)**

Witness testified that he was contracting manager of the United States Steel Products Company, having been engaged in his present occupation since 1909; that after leaving the University of Minnesota in 1898, he erected some power houses and shaft houses at Butte, Montana, then went to Douglas Island, Alaska, in charge of some work in connection with the Homestake, thence back to Minneapolis as assistant superintendent of the Twin City Iron Works, afterwards becoming assistant superintendent of the Minneapolis Steel Machinery Company's plant; and that in 1902, he went with the American Bridge Company as estimator. Thereupon plaintiff admitted witness' qualifications as an expert, and waived further qualification of him as such.

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified, with reference to the general qualities of the trusses used in the buildings at Prince Rupert, which were the subject of this controversy, that there were two types of trusses in these buildings,—the so-called peak truss and a flat truss; that a truss is designed to carry only one load, a vertical or roof load, and that the truss must be absolutely perpendicular in order to carry that load; that a truss can vary in length and depth, and the load which it can carry is directly proportionate to the metal which is in the truss itself and to the depth of the truss; that a shallower truss would be much heavier metal than a deeper truss; that if a truss is supported on its side, it will collapse, there being not enough strength in the truss to carry it; that, therefore, a truss cannot be laid into a boat flat; that the hatches were not deep enough and the hold was not deep enough to load the trusses in a vertical position; that where the truss is a narrow, flat truss, it is sometimes possible to load it in the 'tween decks.

Witness further testified that the blue print detail, previously shown to the jury for a truss for the lean-to to the power house, was a flat truss, which could be put into the 'tween deck where it would be impossible to put a peak truss; also that in loading in the hold of the boat, a truss cannot be got down if there is any dunnage or other material in the bottom of the boat; that that was the case in this particular shipment.

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified that if one of these peak trusses were shipped riveted together, it would have to stand on the long chord of the truss, which would evidently be the top part of the truss, if half of the truss be bottom side up; that if the truss were gotten into the bottom of the boat, it was not strong enough to support any load whatever, and there would be crumpling in the structure. Witness further testified that one of these trusses for the machine shop or boiler house would weigh about three thousand (3000) pounds; that when lowered into the hatch, it has to be moved further into the hold entirely by hand; that if these trusses were laid on their side on the bottom of the vessel, or in any way but perpendicular, nothing could be loaded on top of them, and there would just be a light load, nothing but trusses scattered over the bottom of the boat; that no other steel could be packed on top of them and, if there were, the angles would all crimp out and be bent out of shape.

Witness further testified that the large gusset plates projecting out from the sides of the members just blocked so much space in the hold of a boat, and if anything dropped on them, it simply bent them down and crimped them up; that in all work such as this, where the holes are in and tight fits are necessary, it is hard to bend the material back in shape again and make it join; that it is not easy to put on large gusset plates where they extend out so there is danger of bending them

(Bill of Exceptions—Testimony of C. C. Overmire.)

down. Witness further testified that the average thickness of one of these large gusset plates, such as are shown on the detailed drawings in evidence in this case, ran from three-quarters ($\frac{3}{4}$) of an inch to half ($\frac{1}{2}$) an inch and five-eighths ($\frac{5}{8}$) of an inch.

Witness further testified that he was familiar with the manner in which this particular steel was shipped from the factory to the site at Prince Rupert; that it was fabricated at the Ambridge plant of the American Bridge Company, loaded on cars up to New York City, and there transferred to steamers by the stevedoring company in charge; that if this steel had come by rail, it would have been loaded and secured right at the factory; that there would have been a large difference in the amount of fabrication done in the factory if the steel had come by rail instead of by water; that the trusses would have been loaded in a vertical position right on the cars at the shop; that if a truss were not longer than a single car and not higher than the thickness which the railroad companies allowed for tunnels, the entire truss would be assembled, but if it were too long to go on a single car, it would be cut in two and loaded on the inverse side, on the top chord, and they would all have been loaded, wired together and securely fastened, so that they must remain in a vertical position during the trip; that none of these trusses would ever have been loaded flat on the car.

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified that the buildings at Prince Rupert were what were termed light mill buildings, some of them just composed of columns and trusses and light material to support the sheathing; that the buildings contained a large amount of truss work in proportion to the total amount of work involved; that this work was not nearly as heavy, nor as stiff, as bridge work, and would not stand the strain of shipping as well; that a bridge has to take more moving than a building truss, which only has to stand one load, such as it might get from snow.

Witness further testified that a steel under-frame for a car is rectangular in shape, the main sides of it being generally heavy channels, with a heavy cross frame across each end, and a longitudinal brace running right through, that the frame is also braced up to take any load, as it has got to take the load that the car is supposed to carry, as concentrated loads come on the ends of car frames, and as a car has to stand the jolting for compressional strain and all the pull of the entire load of the train, so that it is really a very rigid piece of steel; that it can be hooked onto in any place without disturbing it, as it is one of the most solid and rigidly constructed pieces turned out of the shop; that car frames cannot be hurt as can little light trusses, such as these on the Prince Rupert work.

Witness further testified, in referring to the difference between the character of the steel shipped

(Bill of Exceptions—Testimony of C. C. Overmire.)

on this job and the character of the steel usually included in the ordinary building contract, that in a building there are heavy columns and heavy beams and girders, which, on account of the space in a building, are required to be kept as small and compact as possible, and are, therefore, very heavy members of very little bulk, while in these roof trusses there is a lot of bulk and no steel. Witness further testified that the Lincoln High School, concerning which there had been testimony, was a typical style job, with columns, girders and beams; that he had figured on the job; that the roof trusses on the new O.-W. R. & N. freight depot, which had been mentioned, were just light columns and trusses; that the Lincoln High School or the freight shed would have trusses somewhat similar to these trusses.

Witness further testified that the steamship companies do not like to handle members of thirty-five or forty feet long, or bulky members either; that there is no rate published on large members; that the weight is limited by the capacity of the ship's tackle, and that usually on coastwise shipments, bulky light roof trusses are loaded like a deck load, loaded on deck, and very, very seldom is any of this light material loaded in the hold; that if the vessels have a cargo which will permit them to make a deck load, they will quote a rate on the material, but if the capacity of the ship is filled up, or if their load is so arranged in the hold that they cannot

(Bill of Exceptions—Testimony of C. C. Overmire.)

carry a deck load, a rate cannot be secured, that then a special rate by agreement must be made in each particular case.

Witness further testified that this particular steel came by water over the Maple Leaf Line from New York around the Horn; that he did not know anything about the restrictions on deck loads for vessels coming around the Horn, or whether such vessels permit steel to be carried as a deck load.

Witness further testified that in loading a ship, a ten thousand (10,000) ton ship, ten thousand (10,000) tons of rails cannot be loaded in the bottom of the ship or the ship would never get to its destination; that there has to be a certain amount of bulk; that there had to be a metacentric point; that, for example, a four thousand (4,000) ton ship, such as these ships were, would have to load part of the material in the hold, and part of the material in the spar deck or 'tween deck; that vessels liked to take the steel cargo for ballast and get a bulk cargo also; that in this particular instance there was no bulk cargo available, and the ships bringing the steel carried nothing else besides. Witness further testified that the location had a lot to do with the way in which the steel was shipped; that the charter of the ships, carrying this steel to Prince Rupert, was made to the furthest northern point to which a charter has ever been made; that there are no regular carriers going to this point, and that the defendant company had ar-

(Bill of Exceptions—Testimony of C. C. Overmire.)

ranged for these three ships; that they had tried to get cargo for them and could not do so; that it was necessary for them to make these charters for this special trip, and, being in a new and sparsely settled territory, there was no general cargo to go along.

Witness further testified, referring to the manner in which the sub-contract with plaintiff company was entered into, that the New York office of the defendant company received an inquiry from the Grand Trunk Pacific Railway for these buildings; that, after the estimate of the weights had been made, the estimate was sent to him, and he was requested to give the New York office an estimate on the erection; that the estimate showed that the defendant company had been asked to figure in three (3) ways: one on the basis of the steel fabricated at Chicago for quick shipment by rail; another, shipment from Pittsburg using mill material, on longer delivery, and shipping by rail, and the third, a long time delivery, figuring on Pittsburg fabrication of the mill material and shipping by water; that he knew he had Canadian concerns competing on this job who only pay a ten per cent (10%) duty on plain material, while defendant company was paying thirty-five per cent (35%) on the fabricated material, so that it was necessary for defendant company to avail themselves of every advantage they had in order to land the work; that, therefore, it looked to him from the start as if water

(Bill of Exceptions—Testimony of C. C. Overmire.)

shipment would be necessary; that when he received the inquiry, he got in touch with Poole, explained the job to him, and asked him if he would care to figure with defendant company, and that Poole replied in the affirmative, so that he and Poole went to Prince Rupert on the first ship they could get, to look over the site and see what had to be done.

Witness further testified that, when he got to the site of the proposed plant, there was a piece of dock away out in the ocean; that he got off the ship, took a launch, went down to this dock and met Pillsbury, the chief engineer; that they were running gopher holes into the hill back of the shore line, blasting the hill away; that it was about eight hundred and fifty (850) feet from the dock to the shore line, and about one thousand (1,000) feet across; that Pillsbury stood on the dock and pointed out where the foundry building was to go; that witness said, "I don't see much that looks like a foundry building"; that Pillsbury said there was twenty-two (22) feet of water over it at that time; that it was entirely filled in with rock blasted down from these mountains; that that was all there was when Poole and the witness first went to Prince Rupert.

Thereupon defendant offered in evidence a sketch of the Prince Rupert site prepared by the witness, and which was identified by the witness, received in evidence and marked "Defendant's Exhibit A-21."

September 11, 1913



WATER

850 ft. (about)

1100 ft. (about)

LINE

SHORE

SHORE LINE

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified that he and Poole went to Pillsbury's office after they had been out and seen the water, and got there a set of plans and specifications, which they looked over and saw the scope of the work; that witness had an estimate showing the amount of tonnage in the different buildings; and witness and Poole talked with Pillsbury on the dock regarding the possibilities of the site, and got all the information they could; that witness and Poole did not take any plans or specifications away; that they saw them in Pillsbury's office; that Poole was with the witness when they saw the plans and specifications together; that Poole and witness inspected the plans and specifications together.

Witness further testified that, after he and Poole had gotten all the information together, they took the ship and started back to Seattle; that on the way to Seattle, Poole arrived at the price at which he would put up the work, and from Seattle witness wired the price into New York, and at that time told Poole that if defendant company got the contract on the basis of the buildings to be erected, defendant company would give Poole the contract at he price he mentioned. Witness further testified that immediately upon leaving Prince Rupert, he and Poole started talking over the price; that the first price Poole mentioned was about Fourteen (\$14) or Fourteen Dollars and a half (\$14.50) a ton; that then they thought of some other condi-

(Bill of Exceptions—Testimony of C. C. Overmire.)

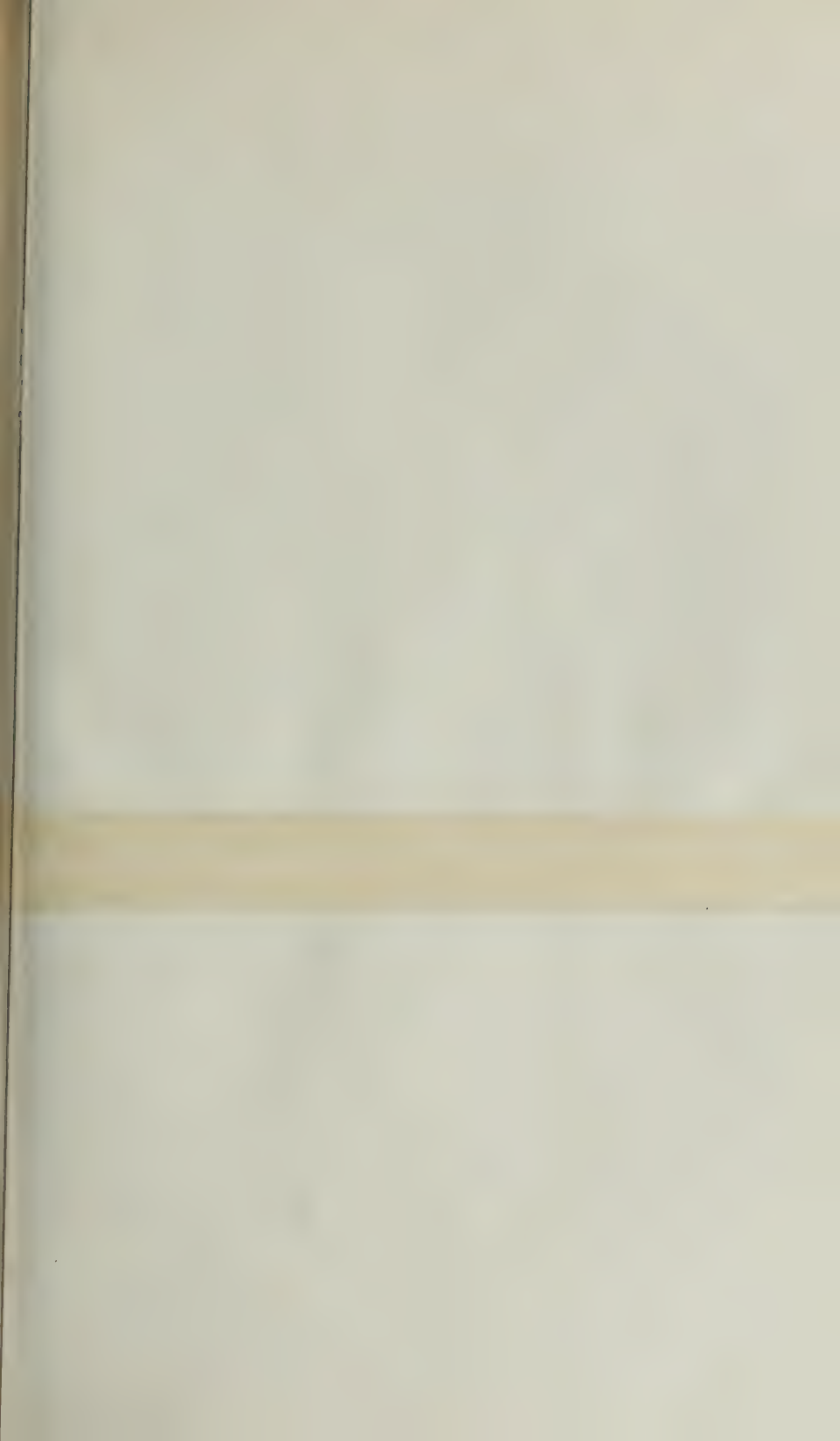
tion which might arise, and the price went up to Fifteen (\$15), Sixteen (\$16), Seventeen (\$17) and finally to Eighteen Dollars (\$18); that then they had covered everything, so witness accepted that price, and that was the price which was turned in and at which the contract was let.

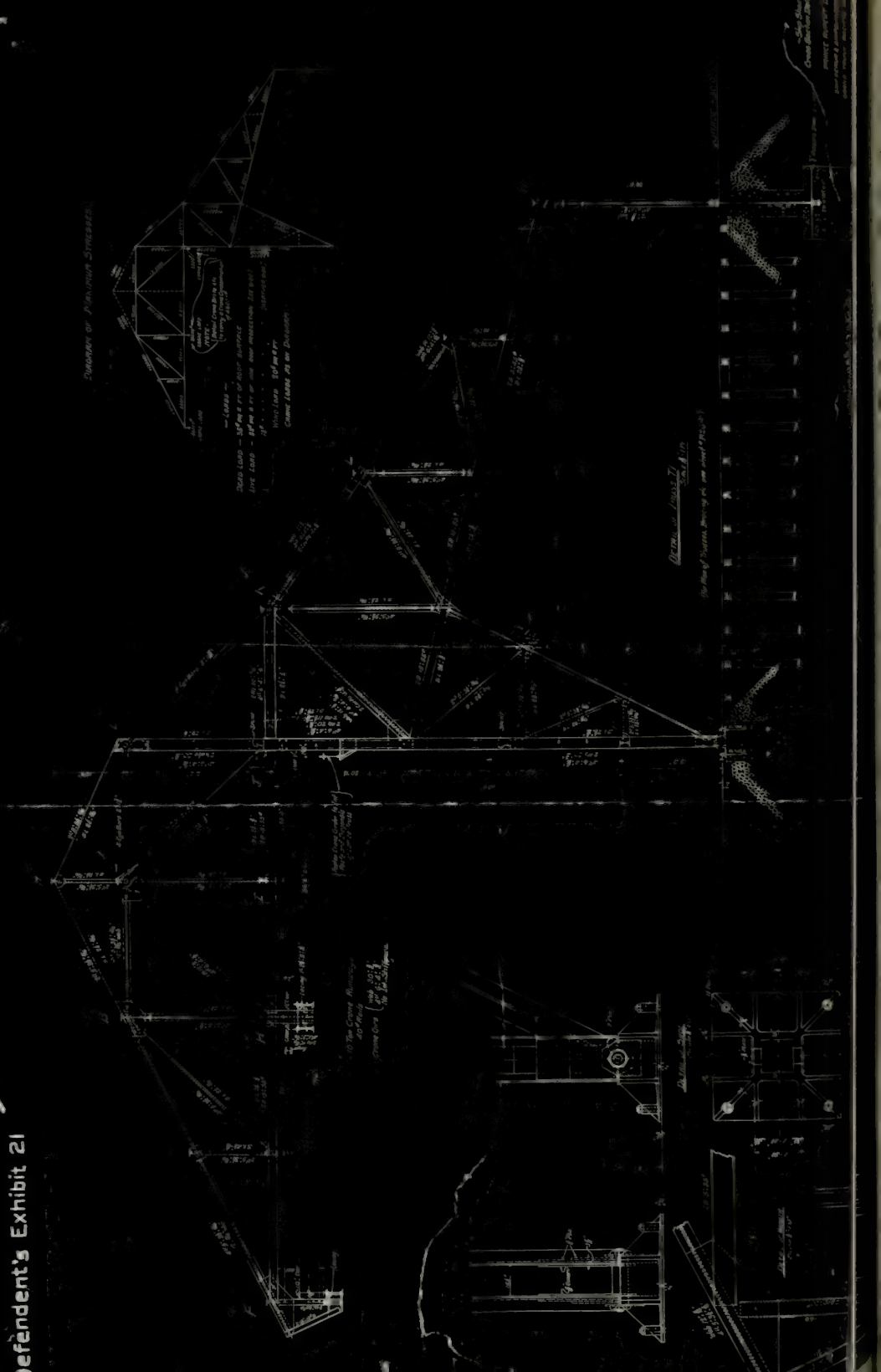
Witness further testified that at that time he spoke to Poole concerning the way in which this steel might come, whether by rail or by water; that Poole stopped with witness at Vancouver, when witness took up with the railway the question of shipping by car-ferry or barge, and witness advised Poole that, in his opinion, in order to meet competition, it would be necessary for this material to move by water, it being considerably cheaper, owing to the fact that it would move in foreign bottoms from this country to British Columbia.

Witness further testified that Poole made no difference in his price, nor any reservation as to change in price depending upon the way in which the steel might come, whether by rail or by water; that the conversation between witness and Poole, in regard to the amount of fabrication which the steel would have undergone before it arrived, came up in connection with one print only, a print on the ship shed; that they looked over the plans, and there was only one detail sheet in Mr. Donnelly's plans that showed anything at all which would form the basis as to the amount of work which would have to be done in the field; that this ship shed plan was

(Bill of Exceptions—Testimony of C. C. Overmire.)

the one that they looked at; that Poole asked the witness about how that would come out; that witness was not conversant with the boat it would come on, or the size of the hatches, and replied that the material would be shipped as was customary for that class of material; that Poole's figure was based upon that supposition. Witness further testified that a plan and an original design are one and the same thing; that they are prepared by some agent of the owner; that from those plans the shop details for the steel work are made; that the original plans in this instance were made by an engineering firm in New York, Kirby and Donnelly, Mr. Donnelly being in charge, employed by the Grand Trunk Pacific Railway; that in this particular instance, the specifications which Mr. Donnelly prepared stated that the details must all be approved by the engineer; that defendant company first ordered from these general plans the material from the mill, next prepared the details and sent them to Donnelly's office for approval; that these details must be approved by the engineer before a hole can be punched or any of the cutting done at all; that the details were returned to the defendant company either approved or for correction; that if they were approved, they were turned into the shop and the shop work commenced; that if they were not approved, they were corrected and returned to Mr. Donnelly, and that process kept up until they were finally approved, and then the





(Bill of Exceptions—Testimony of C. C. Overmire.)

work went on in the shop; that none of the steel in this case was fabricated without having the details approved by Mr. Donnelly.

Thereupon defendant offered in evidence a blue print plan, which was identified by the witness, received in evidence and marked "Defendant's Exhibit 21."

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified, referring to Defendant's Exhibit 21, that it showed the general construction, a section through the ship shed; that it showed a column supporting a cantilever truss which hangs out over the launching ways and the two crane runways which hang in the top of the building; that said Defendant's Exhibit 21 was the plan to which witness had previously referred as having seen in Pillsbury's office; that both witness and Poole saw said Defendant's Exhibit 21 at that time. Witness further testified that Poole asked him how much of this truss would come riveted up, that these plans do not indicate the riveting, either shop or field; that the connections are all left to the draftsman to figure out the strength of the connection and the number of rivets necessary to develop the full strength of the member; that not knowing how that was coming out, witness made the reply which he had previously stated, namely, that the material would be fabricated and shipped as was customary for this class of material.

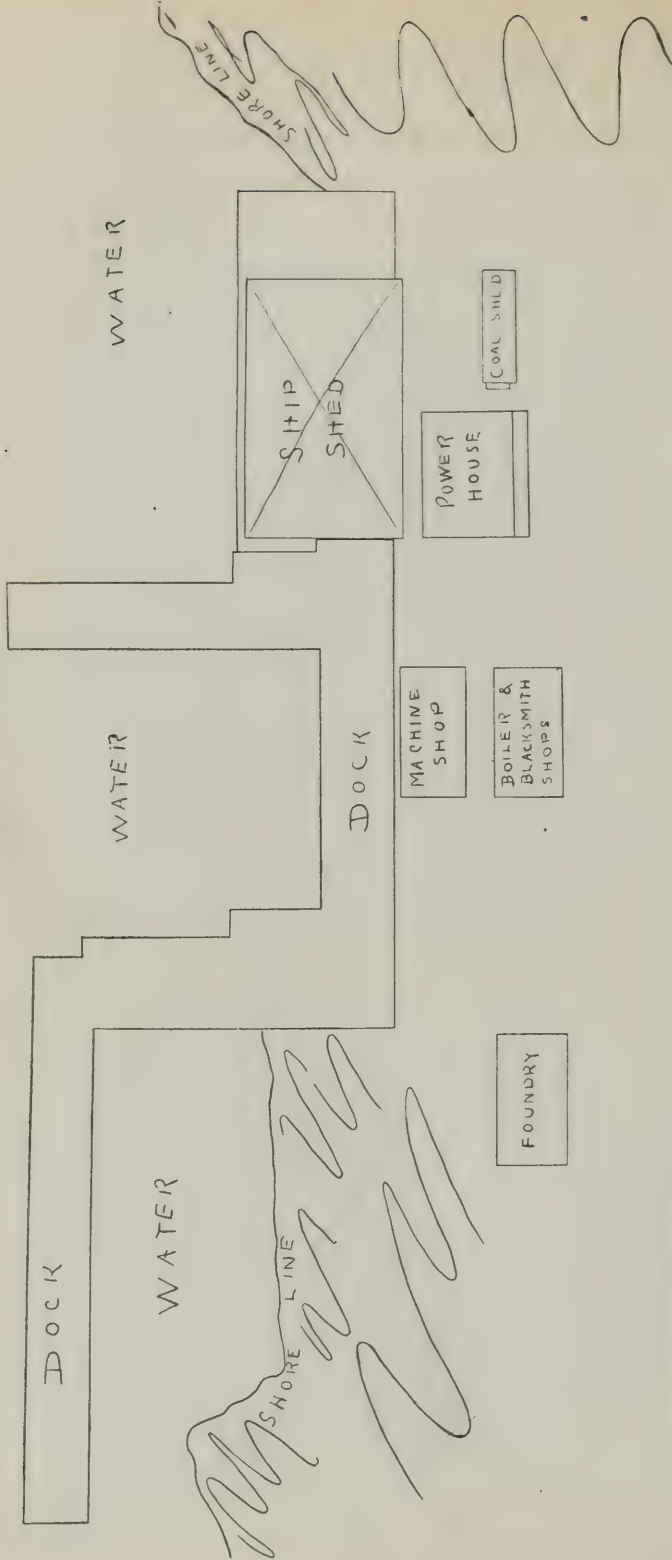
Witness further testified that nothing was ever said between him and Poole about promising to reimburse plaintiff company in case they were put to any extra expense for fabricating.

Thereupon defendant offered in evidence a sketch of the site at Prince Rupert after construction work had commenced and when the steel was first de-

(Bill of Exceptions—Testimony of C. C. Overmire.)

livered by the defendant company at the dock, which sketch was identified by the witness, received in evidence and marked "Defendant's Exhibit 22."

DEFENDANT'S EXHIBIT 22.



Ground Plan of
Completed Docks
and Buildings

Defendant's Exhibit

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified, referring to Defendant's Exhibit 22, that the fill had been completed out to the point shown, and then ran down underneath the dock to the ship shed; that the site is all filled up to grade at the present time.

Witness further testified that there was never any understanding or agreement between him personally and Poole concerning the manner in which plaintiff company should carry on the work, or when they should begin the work; that it was transmitted through witness from Donnelly; that defendant company never, on its own responsibility, promised plaintiff company to reimburse them for any delays which they might experience; that witness believed that Donnelly at one time wrote a letter stating that if plaintiff company would follow his instructions and proceed with the work as he ordered them to, he would be responsible for delays; that the understanding between plaintiff company and Donnelly was transmitted through witness' office; that on the buildings there was not much delay, but that Poole did wait for pontoons for the floating dry dock; that these pontoons had not been completed by the people who were building them for the Grand Trunk Pacific Railway, and that there was a space of time, of about two months, when there was no work to be done at the site. Witness further testified that these pontoons were for a patented dry dock; that a pontoon is simply a large barge on the sides of which is erected steel

(Bill of Exceptions—Testimony of C. C. Overmire.)

caissons, on top of which are the pump houses; that in order to sink the barge, sea-cocks are opened letting water in, and the pontoon sinks to a certain point, beyond which its own buoyancy prevents it from sinking, that then the ship is run in on the barge, the pontoon pumped out, and the whole structure brought out; that these pontoons were the barges underneath forming the bottom of the dry dock; that they were built by the Grand Trunk Pacific, or by some contractor in their employ.

Witness further testified that the specifications covered the manner of furnishing of these pontoons to the plaintiff company, and that it was never discussed between witness and Poole until such date that it looked as if there was going to be a delay; that then Donnelly ordered Poole to go ahead with two pontoons, and the work was tied up waiting for the second pontoon.

Witness further testified that Defendant's Exhibit 20 was a copy of the specifications which he saw in Pillsbury's office; that he could not say whether or not it was the exact copy as he did not go over them; that this copy was made by being typewritten on a very thin piece of paper or tracing cloth and the prints then taken from that; that it was a blue print, the same as a detail sheet. Witness further testified that nothing was ever said between him and Poole concerning the supervision of this work which would in any way change the provision of these specifications providing that "the

(Bill of Exceptions—Testimony of C. C. Overmire.)
design, construction and equipment of the floating dry dock is to be under the direct supervision of Frank E. Kirby or William T. Donnelly, or their authorized representative. The term 'supervising engineer,' when used in these specifications, shall be understood to mean Frank E. Kirby or William T. Donnelly, or their authorized representative"; that it was witness' understanding that these specifications covered the contract absolutely.

Witness further testified that it was problematical as to when the ships would arrive, but that he got notice of the passing of the ship by wireless and notified Poole, and while the steel was in transit Poole was ordered to have equipment there to receive the material on the docks when the ship arrived, and to start his erection; that the question as to when Poole would be ordered to commence work, or would not be ordered to commence work, was all governed by Donnelly; that witness had nothing to do with that; that witness told Poole that defendant company was governed strictly by the specifications and would expect him (Poole), as a sub-contractor, to be governed likewise.

Witness further testified that no understanding was ever entered into between him and Poole to the effect that he would not order Poole to begin work until such time as he could continually keep at work without delay, unless such understanding was in the specifications; that no such understanding was covered by the specifications, so far as witness knew;

(Bill of Exceptions—Testimony of C. C. Overmire.)

that witness never made any promise to Poole that he would not order him to begin work until he could continually keep at work; that no one else to witness' knowledge ever made any such promise to Poole on behalf of the defendant company.

Witness further testified that when plaintiff company received the shop details, Poole came up to witness' office with them; that witness had office copies of them, but had not examined them carefully; that Poole complained that the details showed considerably more detail work than he had contemplated and said something to the effect that he would expect to be reimbursed; that there were several complaints made after that about the amount of field work; that Poole wrote witness a letter stating that witness had told Poole that the material would be fabricated as was customary; that witness believed this letter was in evidence.

Witness further testified that no promise was ever made to Poole in regard to how the material would be fabricated; that at that time the steel was on the way; that witness did not at that time make any promise to Poole as to how the steel was going to come; that witness did not promise Poole or agree with Poole to reimburse him for fabricating in the field. Witness further testified that it would not have been in his power at that time to change the way in which the steel would come and was coming, so far as fabricating was concerned.

Witness further testified that defendant com-

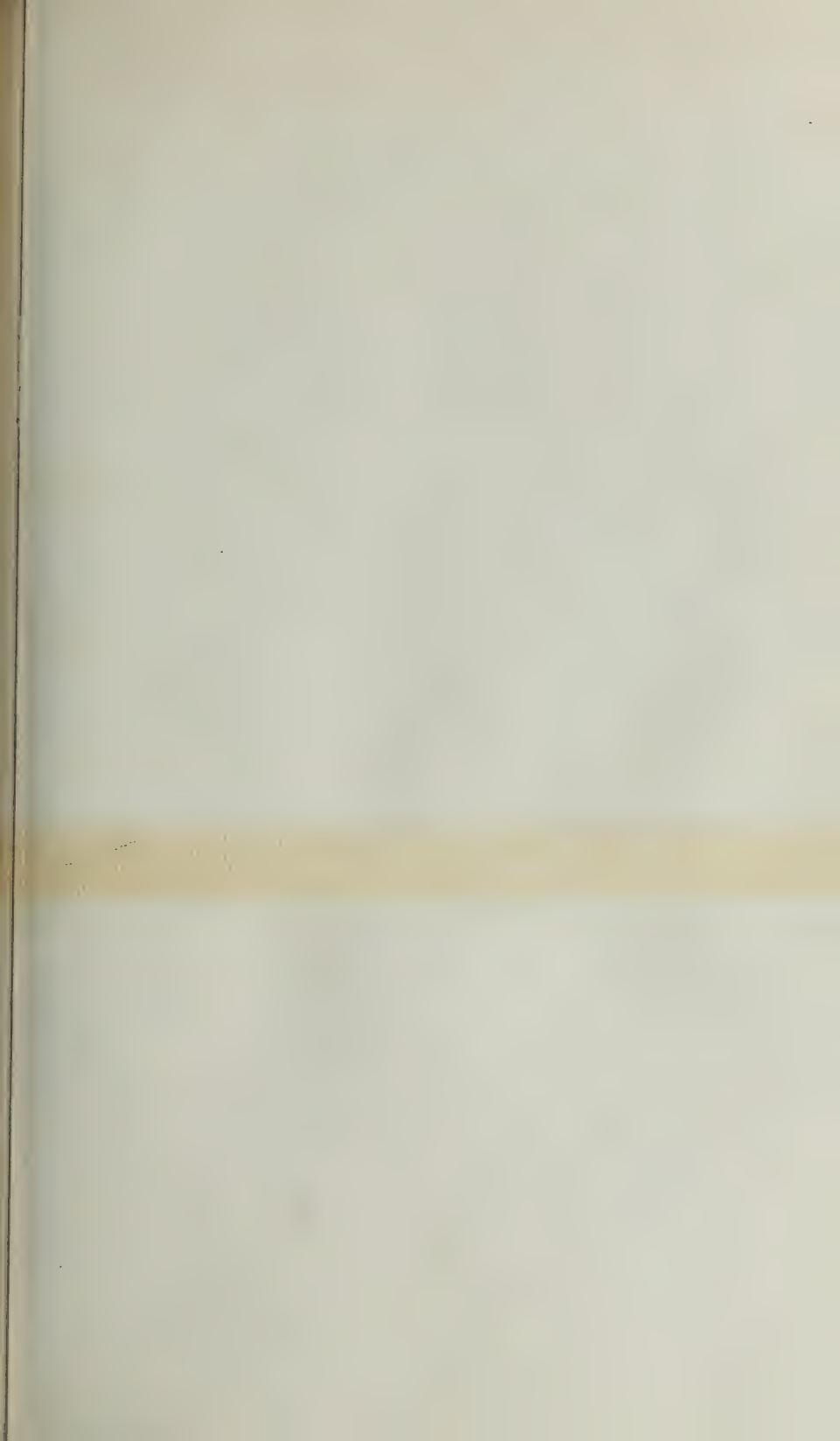
(Bill of Exceptions—Testimony of C. C. Overmire.)

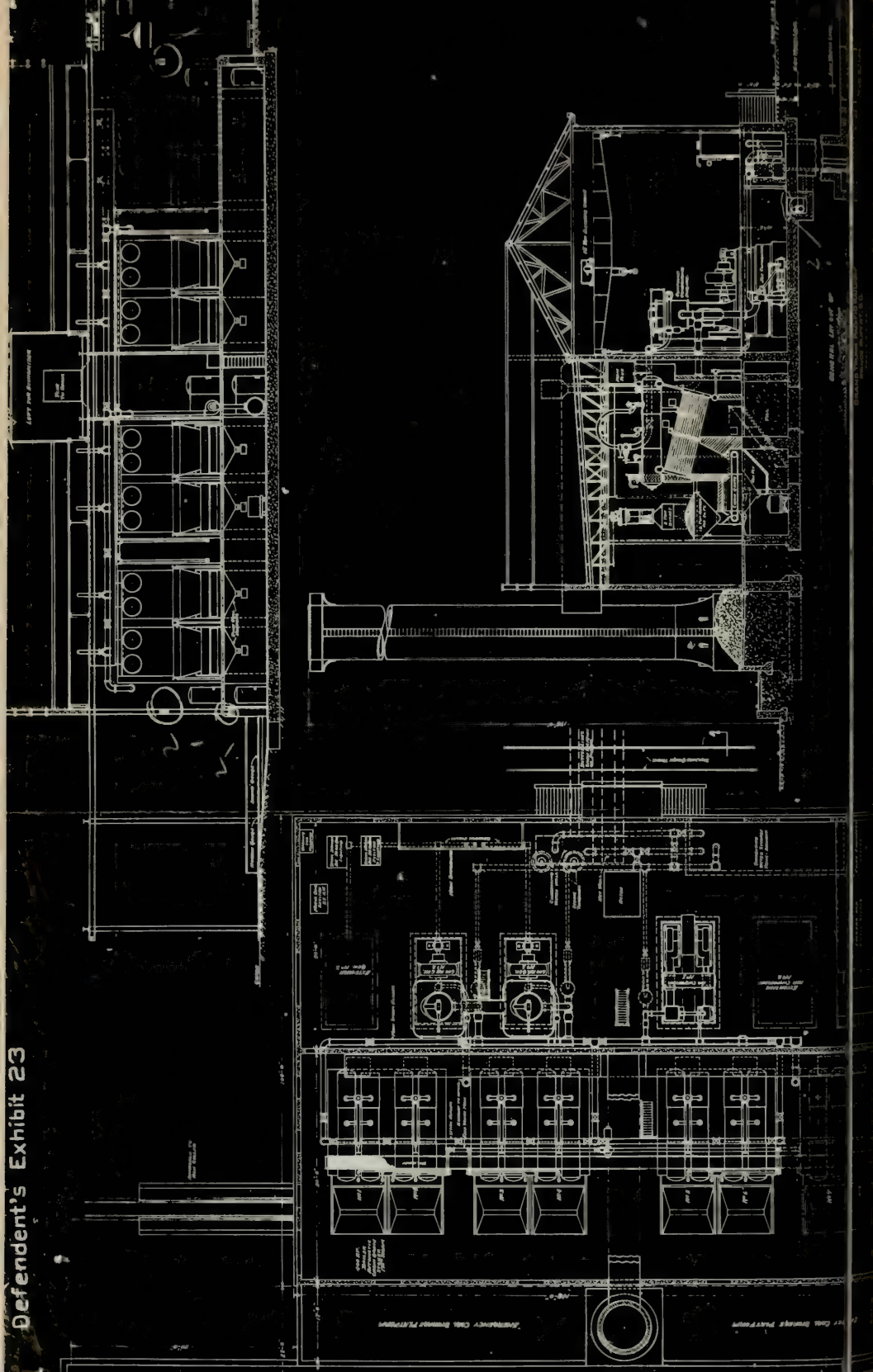
pany was an original contractor for the furnishing and erecting of the structural steel; that the contract was given to the defendant company by the Grand Trunk Pacific Railway; that defendant company was acting under the Grand Trunk Pacific Railway Company's engineer, Mr. Donnelly.

Witness further testified that he had nothing to do with furnishing the plaintiff company space for sorting and delivering the steel; that at the time he and Poole were at Prince Rupert the first time with Pillsbury, Pillsbury showed them a sketch, while they were out on the dock, of the proposed dock, and at that time Poole asked Pillsbury as to the capacity of the dock, and other questions as to the dock itself, and Pillsbury told Poole what the capacity of the dock was, and, witness believed, also told Poole that he could have sufficient space there in which to handle this steel and to do his work on the dock; that witness made no promises and said nothing to Poole as to witness furnishing Poole with space; that witness had nothing to do with the dock, and could not have furnished Poole with space if he had wanted to; that Pillsbury was the engineer in complete charge of the site; that several times subsequently Poole said he was short of space, and witness took it up with witness' representative at Prince Rupert and tried to arrange for more space for Poole. Witness further testified that he never requested Mr. Steele or Mr. Fey themselves to provide space; that he requested them to see Pillsbury

(Bill of Exceptions—Testimony of C. C. Overmire.)
and find out if he (Pillsbury) could arrange for more space with Poole.

Witness further testified that he was acquainted with the circumstances surrounding plaintiff company's claim for extra work amounting to Four Hundred dollars and seventy cents (\$400.70); that after the original plans and specifications for the dry dock had been prepared, Donnelly decided or had to increase the size of his compressor and pump house on top of the wings; that Donnelly instructed Pillsbury to order this work to be done; that defendant company furnished some little additional material for this work, and Pillsbury instructed plaintiff company what to do; that plaintiff company, as subcontractors under defendant company, notified witness that they would look to defendant company for payment, providing they did not obtain it from the Grand Trunk Pacific. Witness further testified that, upon taking the matter up with the Grand Trunk Pacific Railway, he found that the work had been performed and that plaintiff company's bill had been presented to the Grand Trunk Pacific Railway Company for payment and approved by them. Witness further testified that neither he nor his office had at any time ever paid plaintiff company's bill for this amount, or ever approved any bill for payment or given plaintiff company credit for it; that this amount was not included in defendant company's original contract with plaintiff company; that he could not recall whether he ordered





(Bill of Exceptions—Testimony of C. C. Overmire.)

the work done, whether copies of the order went through his office, or whether the order for it was given direct by Pillsbury. Witness further testified that in any case, so far as giving the order was concerned, the original office would be Donnelly's office in New York; that Donnelly, and not defendant company, ordered the work done.

Witness further testified that defendant company never had anything to do with the preparation of the original plans prepared by Donnelly; that they were prepared entirely by Kirby and Donnelly.

Thereupon defendant, at the request of the Jury, offered in evidence a blue print plan, which was identified by the witness, received in evidence and marked "Defendant's Exhibit 23."

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified, referring to Defendant's Exhibit 23, that it showed a plan of the power house, a section through it, showing the trusses for which the details had already been introduced in evidence; that there was nothing shown on it at all to indicate how the material would be detailed; that there is not a rivet shown on the job; that it is simply a line sketch, showing the general construction; that the scale dimensions and columns shown on the plan are used by the draftsman as guides in making his details; that in the competition, which the defendant company would have against the Canadian Bridge Company, at Walkerville, Ontario, and the Dominion Bridge Company, at Montreal, defendant company would have to ship by rail to Vancouver, or by water out to the seaboard and then around the Horn, so that there were no explanatory notes on the plans showing how fabrication was to be done, but that the work was awarded to the lowest bidder upon the basis of the material erected in place at Prince Rupert. Witness further testified that there was only one general detail in the plans which showed the amount of fabrication required by the engineer; that the specifications said nothing about it, being just general; that there was nothing on the plans to indicate to anybody the amount of fabrication which the steel would receive; that where the person who prepared the plans goes into the matter of details, he sometimes just shows the amount of fabrication he requires.

(Bill of Exceptions—Testimony of C. C. Overmire.)

Thereupon defendant offered in evidence a blue
pint plan, which was identified by the witness, re-
ceived in evidence and marked "Defendant's Ex-
hibit 24."

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified, referring to Defendant's Exhibit 24, that it showed the structural iron details for the machine shop and boiler and blacksmith shop, on the Prince Rupert dry dock, ship repair and ship building plant, Frank E. Kirby and William T. Donnelly, engineers; that this was the shop detail which he had just testified was one of the set which he and Poole saw in Pillsbury's office; that it was a typical detail which was followed on all the buildings; that the buildings were similar in general construction so far as trusses were concerned; that this detail design was intended to give an idea of what the construction would be.

Witness further testified that said Defendant's Exhibit 24 showed all the trusses to be shipped knocked-down, that in this detail, prepared by Donnelly, there is not a rivet driven; that it showed all knocked-down, and even went so far as to show all the gusset plates were knocked-down; that this detail was what defendant company was guided by; that he did not know how the steel would come, that question being up to the draftsman and to the engineer in approving defendant company's details. Witness further testified that the steel was not, in fact, shipped as indicated on said Defendant's Exhibit 24, but was shipped more completely fabricated than Donnelly's design called for; that as a general thing, it would save a lot of work in the field to have the steel more completely fabricated than the design called for, although there would

(Bill of Exceptions—Testimony of C. C. Overmire.)

have been some rivets which it would have been impossible to drive in the field, and would have to be driven in the shop after the members are assembled. Witness further testified that this detail (Defendant's Exhibit 24) was the only thing he had to go by; that Donnelly is one of the large engineers of the country, and that this detail was attached to his plans, marked "typical structural iron details," and Donnelly's own name was signed to it; that at the time that detail was prepared, Donnelly did not know how defendant company was going to ship the steel; that he knew it could not move in by rail, there being no railroad to Prince Rupert. Witness further testified that Donnelly was familiar with water shipment, having invented this floating dry dock, and shipped work to other countries, and that it was Donnelly's rule to ship it just as completely knocked-down as could be; that this detail (Defendant's Exhibit 24) was on the scale of one-half ($\frac{1}{2}$) inch to one (1) foot; that it was usual to show shop work or field work on some of the typical details drawn to such a scale; that he could not say whether the men who prepared the detail knew the steel was to be delivered before the railroad reached Prince Rupert; that there was quite an open space on the prairie at that time, and, as he recalled it, they were erecting at Prince Rupert when the first train came through.

Witness further testified that this original plan was used as a guide in preparing the details; that

(Bill of Exceptions—Testimony of C. C. Overmire.)

the details were not prepared wholly in accordance with the original plan, in that defendant company riveted on some of the gusset plates, which were shown on this detail (Defendant's Exhibit 24) not riveted; that in other respects this detail (Defendant's Exhibit 24) was controlling, together with the restrictions of the boat, as regards bulk and weight measure; that the defendant company built up as close as it could to the bulk measurement.

Witness further testified, in response to questions by a juror, that he submitted his bid on these plans; that he did not allow plaintiff company Eighteen Dollars (\$18) a ton out of his own figure to the railroad, but that Eighteen Dollars (\$18) a ton was plaintiff company's bid to him; that out of the difference between defendant company's price and the Eighteen Dollars (\$18) a ton must be deducted the cost of the mill material, the cost of transportation from the mill to the plant, the shop cost, and the transportation from the plant to the seaboard; that the structures were worth about between Ten (\$10) and Twelve Dollars (\$12) a ton to erect when completely fabricated, depending upon the location; that a great amount of steel, as shown by the detail (Defendant's Exhibit 24), had to be assembled in the shop, because there were joints with mill surfaces, that all of the plates had to be cut, all the details made, and all the holes punched; that so far as fabricating went, the only thing that was not done in the shop was assembling the punched steel on the

Bill of Exceptions—Testimony of C. C. Overmire.)

job and riveting it up; that there was more fabrication done than was called for, than was usual for water shipment.

Witness further testified, referring to Plaintiff's Exhibit "D," that it was shipped without the gusset plate on, and weighed with the gusset plate forty-five hundred (4500) pounds, equal to approximately two (2) bulk tons; that had the little plate been put on, defendant company would have paid freight for four (4) bulk tons, when the material weighed only about forty-six hundred (4600) pounds, owing to the cubical contents, which would require the payment of freight on more than eight (8) gross tons on material that did not weigh more than five thousand (5,000) pounds; that defendant company fabricated up to a point where the weight measure would come just inside the bulk measurement so that they would not have to pay on the bulk; that that is the reason why some of the details show riveting which had not been done in the shop; that some gusset plates, that were small enough to get in, were even fabricated, if they could be gotten in on the 'tween deck.

Witness further testified that, as indicated by the detail drawing (Defendant's Exhibit 24), the material could have been shipped just cut and punched, that that would have been shipping it knocked-down, but that the material which the defendant company shipped out was not shipped knocked-down; that it was shipped partially fabricated, all fabricated as far as it could be under the

(Bill of Exceptions—Testimony of C. C. Overmire.) conditions. Witness further testified that the figure of Eighteen Dollars (\$18) a ton was made by Poole; that Poole was with witness in Pillsbury's office, talked with witness on the ship going back, and made up his figure and gave it to the witness; that witness based his figure on Poole's estimate; that he based his figure as to furnishing the steel fabricated on these drawings; that this detail (Defendant's Exhibit 24) was the only typical drawing in them; that he expected plaintiff company to do the rest of the fabricating, not shown in the drawings, in the field.

Thereupon, in response to questions by the Court, witness further testified that he and Poole went to Pillsbury's office and saw the plans and specifications; that he did not know whether Poole's attention was called to this detail (Defendant's Exhibit 24), but that they were all lying on the drawing table when they went there; that he could not say whether Poole saw it; that the plans and specifications were all in Pillsbury's office, and that witness and Poole saw them, but that witness did not know what information Poole got from them; that they were there together, and Pillsbury had the whole set; that witness made his contract with Poole, that this steel would come shipped knocked-down, or in the manner in which defendant company ordinarily shipped steel by water; that it was not agreed at that time between witness and Poole that the steel should come as indicated on that detail (Defend-

(Bill of Exceptions—Testimony of C. C. Overmire.)

ant's Exhibit 24); that there was no conversation; that that detail (Defendant's Exhibit 24) simply shows what the engineers showed; that witness promised Poole that the material would come fabricated as was customary in this class of work if shipped by any of the three methods; that defendant company fabricates and ships more steel than all the plants in the United States put together; that witness said the steel would come as was customary, but did not mention defendant company's shop in particular; that witness told Poole that the steel would be shipped as customary by water transportation.

Witness further testified that he could not say whether there was any difference between the custom employed by the defendant company in shipping this kind of steel by water and the custom employed by any other steel maker; that the defendant company produced in the Bridge Department about one million (1,000,000) tons per year; that that approximate figure represents all the way from thirty-five (35%) to sixty per cent (60%) of the steel construction work produced in this country.

Witness further testified that he was not aware of any customs in shipping that kind of steel by water transportation which differed in any way from the way in which this steel was shipped; that the defendant company bid in competition on such material as this with the other large plants in the United States, and obtained contracts right along

(Bill of Exceptions—Testimony of C. C. Overmire.)

for it, so it must be shipped in the customary manner; that his opinion, as to whether or not this steel was shipped in the customary and usual manner for water shipment, was guided entirely by the advice of his engineering department that it was so shipped; that so far as witness' experience went, he would say that the manner in which this steel was shipped was entirely customary.

Witness further testified, referring to Plaintiff's Exhibit "D," that if the gusset plate were riveted on to the main member, it would project about twenty (20) inches beyond the member, which would be a dangerous procedure for shipping, especially where the material had to be transferred from the cars to the boats, and then from the boats to a wharf, and was loaded in the boat where defendant company had no control over the loading. Witness further testified, referring to said Plaintiff's Exhibit "D," that it showed conclusively that there was another member to come in, and that the holes showed the connection for that other member; that had the angle, which had previously been testified to having been shipped loose, been riveted in the shop, those rivets would have to be taken out in the field, because they go through that angle; that it could have been riveted on, but would have had to be cut off in the field; that the mere fact that the connection is left open on the drawing showed that a connection was coming in there, and the space in the holes showed that also; that if that angle had

(Bill of Exceptions—Testimony of C. C. Overmire.)

been riveted, it would have had to be taken off in the field. Witness further testified that the reason the plate was left off was on account of its being liable to damage, and also that the increase would make it necessary to pay freight on eight (8) tons instead of two (2) tons.

Witness further testified that neither he personally, nor his office in Portland, had had anything to do with making the price to the Grand Trunk Pacific Railway, except in so far as he wired in Poole's price; that his business was simply to ascertain from Poole what he would charge and wire it to New York; that Mr. Stratton in New York made up the price; that plaintiff company's figure was given to witness before he had any information as to the New York price, as he did not know what the water transportation rate was, nor the railway they were figuring on.

Witness further testified, in response to further questions by the Court, that at the time he got the price from plaintiff company, he did not have his contract with the Grand Trunk Pacific Railway Company; that he wired plaintiff company's price, which was added to defendant company's delivery price and named by Mr. Stratton to Mr. Guest, and that it was some time later that witness was notified that defendant company would be awarded the contract on the basis of water tight structures in place; that he had not made his contract with the railroad company prior to making a sub-contract

(Bill of Exceptions—Testimony of C. C. Overmire.)

with the plaintiff company; that defendant company did not bid with the railway company until they had received Poole's figure and incorporated that in defendant company's delivered price.

Witness further testified, concerning the allegations in the complaint that he promised Poole he would not order him to start work until such time as he could continuously keep at work, that there had been conversations along that line, but that every conversation has been confirmed in writing; that Poole made several complaints to him, which he immediately took up by wire or letter with Donnelly, advising Donnelly of Poole's contentions. Witness further testified that he never made any promises before the work commenced to plaintiff company that he would not order the commencement of the work until they could continuously keep at work without delay; that he did not recall ever having said anything to plaintiff company which would lead them to think that he had made such promises to them.

Witness further testified that the question as to how long it would be before the steel would be delivered was covered in the engineer's estimate, which he had and which Poole had access to, but that witness did not remember just what it was; that he thought that the stock shipment from Chicago was to start in something like three or four months, then the next shipment from Pittsburg was to be in about eight months, then the first delivery by water in

(Bill of Exceptions—Testimony of C. C. Overmire.)

about a year; that he did not recollect it, it was so long ago; that he was not to deliver the steel to Poole immediately, or anything of that kind.

Witness further testified that he never told Poole, or had any understanding with Poole, that when the steel did arrive, witness would not request him or order him to begin work until he would not be delayed; that that would be entirely for Donnelly to do. Witness further testified that he had no authority to order Poole to start or stop.

**(Cross Examination of C. C. Overmire
for Defendant)**

Upon cross examination, witness further testified that he and Poole went to Prince Rupert early in September, 1912; that at that time he and Poole went over the work, got in touch with Pillsbury, examined the site of the different buildings, and Poole made his estimate based upon the information he got there, and on his way to Seattle; that Poole's estimate was based upon Eighteen Dollars (\$18) a ton; that at that time witness did not know whether or not the steel was coming by rail to Vancouver, thence by car-ferry or barge to Prince Rupert, or by water around the Horn; that he did not wire any estimate as to what it would cost to furnish the steel, but simply as to what it would cost to erect it; that Stratton made the offer of what it would cost to furnish and erect the steel to the railroad, giving three different routes; that plaintiff

(Bill of Exceptions—Testimony of C. C. Overmire.)

company's estimate of Eighteen Dollars (\$18) a ton for erecting was never changed after the first offer. Witness further testified, in connection with the testimony of Mr. Stratton concerning the revision of price under date of October 21, 1912, that witness did not know whether the figures were raised or lowered in revising them; that he had not copies of the original proposal by Mr. Stratton to the Grand Trunk Pacific, and had seen but one such proposal. Witness further testified that defendant company's price was subject to change in mill schedules without notice; that the determination to ship the steel by water, rather than by rail, had absolutely nothing to do with revising the prices, because Mr. Guest had the three propositions before him from the first; that if the steel had come by rail to Vancouver, cars would have been switched onto the car-ferry at Vancouver, taken to Prince Rupert, and hauled as close to the site as possible for unloading. Witness further testified that the steel would have come more nearly fabricated by that route than by all water route; that the steel was shipped from the mills at Ambridge, New Jersey, into New York City; that Ambridge was eighteen (18) miles from Pittsburg; that none of the steel came from Chicago that witness knew of; that the little derrick out on the end of pier three might have come from Chicago; that witness did not know where it come from.

Witness further testified that the steel came in three shipments, on the "Kentra," the "Buena Ven-

(Bill of Exceptions—Testimony of C. C. Overmire.)

tura," and the "Arna"; that if these boats did not at that time belong to the defendant company, they were under charter; that he knew the "Arna" was under charter, but did not know whether the "Kentra" and the "Buena Ventura" belonged to the defendant company or not; that he knew that the "Arna" did not belong to the defendant company. Witness further testified that he saw the "Kentra" and the "Buena Ventura," and that they were about four thousand (4,000) ton boats; that that would be a small boat; that the only measurement he had of the "Buena Ventura" was the depth of the hold; that he got the dimensions from the United States Register; that the "Buena Ventura," from the deck to the bottom of the keel, was twenty-seven (27) feet four (4) inches, and the "Kentra" was twenty-seven (27) feet two-tenths ($2/10$) of an inch, and the "Arna" twenty-seven (27) feet six (6) inches; that the "Buena Ventura" and the "Arna" had a 'tween deck and the "Kentra" had a spar deck, which answers the same purpose, a deck lower than the main deck.

Witness further testified that these boats base their freight rate charges on forty (40) cubic feet equal to one (1) ton; that if the forty (40) cubic feet are not used up, freight is paid by the weight measure; that if a truss only weighed five hundred (500) pounds but took up twenty (20) cubic feet, freight would be paid for twenty (20) cubic feet, or half ($1/2$) a ton; that if the truss put in there only

(Bill of Exceptions—Testimony of C. C. Overmire.)
weighed four hundred (400) pounds and took up forty (40) cubic feet, freight would be paid for one (1) ton, irrespective of the fact that it did not weigh one (1) ton.

Witness further testified that he had absolutely nothing to do with furnishing space to plaintiff company for unloading material; that he never made Poole a promise as regards space in Prince Rupert; that he transmitted every bill he got from Poole to defendant company's New York office for adjustment with Donnelly.

Thereupon plaintiff introduced in evidence a letter dated January 13, 1914, which was identified by the witness, received in evidence, and marked "Plaintiff's Exhibit S," which is as follows:

(Plaintiff's Exhibit S)

“UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Portland, Oregon, January 13, 1914.

Subject: Prince Rupert Work.

Mr. W. H. Stratton,

U. S. Steel Products Co.,

New York City.

Dear Sir:

Referring to conversations regarding the above subject while in New York, I have to advise that I have had several talks with Mr. Poole during the last few days regarding the difficulties that he is

(Bill of Exceptions—Plaintiff's Exhibit S.)

encountering at Prince Rupert and which are accounted for because of failure of the Railway Company to provide facilities and do certain work in accordance with their promises to us when we were at Prince Rupert on this work.

The dock is built in accordance with the original plan, but inasmuch as very little dredging has been done outside of the dock it is impossible for a ship to land except at the northwest corner of the dock, and all material from the ship must be handled with one boom at a time. This necessitates a large amount of extra work in order to move the material and keep the dock clear beneath this boom, resulting also in slow unloading of the ship.

The dock has been piled with coal, sand and lumber, so that it is difficult to find storage space for the material as it is unloaded.

It is difficult to find space in which to store the 400 tons which was on the "Buena Ventura," so that we are expecting a great deal of trouble in storing the 1500 tons which is on the "Kentra."

I have a bill from the Prince Rupert Stevedore Co. for handling material from the ship's slings in connection with the "Buena Ventura" in the amount of \$380.70. This bill will not be passed for payment, however, until some of the material which was lost overboard is recovered or replaced.

Poole has been able to complete the erection of the foundry building under difficulties.

The Railway Co. promised that the sites of

(Bill of Exceptions—Plaintiff's Exhibit S.)

these buildings would be completely filled to grade when erection should start, and that roadways would be provided for transporting material from dock to the building site.

The fill has not been completed under any building to grade, and it was necessary to put in cribbing and false work in order to erect the steel of the foundry building.

The foundations of the other buildings were pushed out of place by the fill, and the new foundations are now being put in, which is of course delaying our crews.

We were informed when at Prince Rupert that the material for the ship shed and dry dock could be unloaded upon the dock directly adjacent to the site where the material would be used. This is not possible at present, and the material will of necessity be transported some 2000 to 3000 feet.

About the only building upon which work can be done at present is the power house, and crews are at present upon work at this building.

None of the pontoons have as yet been constructed, although the Railway Co. is now receiving timber for this work, and piling it upon the dock, which is going to result in a greatly increased cost in our handling charges.

The above information is given you at this time upon representations to me by Mr. Poole, as being reasonable cause for charges for extras in connection with this work, as they were not contemplated

(Bill of Exceptions—Plaintiff's Exhibit S.)

by him in his figure, and are caused wholly by acts of the Railway Co. in not giving us the accommodation that was promised us at the site.

Mr. Poole is somewhat worried about storage space for the material which is on the "Kentra," and insists that I go to Prince Rupert with him Sunday night in an endeavor to have the Railway Co.'s representatives at Prince Rupert make arrangements whereby we can get our material on the dock in shape, so that it can be handled economically; and I am therefore sending a copy of this letter to Mr. DeForest, so that he may be advised as to the situation at Prince Rupert, and I will act in accordance with his advice.

So far the Portland office of the Poole-Dean Co. have not received any bills for extra work in connection with the work which has been done.

Mr. Poole seems very desirous of our satisfying ourselves as to the condition at Prince Rupert, as he feels that he is entitled to extra compensation because of the extra work, and he does not feel that we are in any way to blame for this extra work, inasmuch as I was present during all the conferences with the railway people and we are being handicapped because of acts of the Railway Co. which we are in no way responsible for, and which are in direct violation of their promises to Mr. Poole and myself.

I give you this advice at this time, so that you may present the matter to the Railway Co. if you

(Bill of Exceptions—Plaintiff's Exhibit S.)

deem advisable, but it occurs to me that if I do go to Prince Rupert it might be well for you to hold this matter in abeyance until you receive definite advice from me regarding conditions; after I have had the opportunity of looking the ground over for myself.

I will therefore wire you on the 16th or 17th instant whether or not I will leave for Prince Rupert on the 18th.

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

Contracting Manager.

CCO-C

Cy to A. T. DeForest,

E. J. Schneider."

Thereupon plaintiff introduced in evidence a letter dated March 6, 1914, which was identified by the witness, received in evidence and marked "Plaintiff's Exhibit T," which is as follows:

(Plaintiff's Exhibit T)

“UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Portland, Oregon, March 6, 1914.

Subject: Prince Rupert Work.

Mr. W. H. Stratton,

U. S. Steel Products Co.,

New York City.

Dear Sir:

I am in receipt of yours of February 28th, together with copy of Mr. Pilsbury's letter of the 17th, and after going over Mr. Pilsbury's letter I do not see that he has in any way contradicted very materially any of the statements I have made.

Referring to paragraphs 2, 3 and 4 of his letter will state that, on the occasion of Mr. Poole's and my first visit to Prince Rupert we were very careful to inform ourselves as to the condition that the docks and site would be in when the steel arrived.

Mr. Pilsbury acknowledges that the site was not in the shape which we contemplated, but as to the extra expense in handling this material I have previously informed you that the dock was filled with timbers and that there was no storage space on the dock for this steel. This steel had to be moved from the ship's side as unloaded and was stored where the pictures I have forwarded you show it as being stored. It was found impossible at the time the ship was unloaded to deliver this

(Bill of Exceptions—Plaintiff's Exhibit T.)

material to the buildings where it was intended to be used.

Our bid was based upon information by Mr. Pilsbury that the docks would be completed and could be used for unloading and storing material. Because of the fact that we could not store the material on the dock it could not be sorted as unloaded. This necessitated additional handling, which is the reason for the bill of extras as against the Buena Ventura.

As the steel is not yet on the site of the various buildings more handling will be necessary, which will cost the contractor as much as it would have cost them to have delivered direct from the ship to the building site.

A few hundred feet in the distance of transportation of material does not make very much difference in the cost, as the main item of the cost is the handling, that is to say—loading and unloading.

Referring to paragraph 5 of Mr. Pilsbury's letter, it is acknowledged that the cheapest way of transporting material from the Kentra to the ship's shed site was by scow. This does not alter the fact, however, that Mr. Poole and I were informed that the ship could unload at the ship shed site.

As to Mr. Pilsbury's comments regarding sorting, will state that we were paying \$50.00 a day for barges and scows, and as only four scows were available at Prince Rupert there was no time for

(Bill of Exceptions—Plaintiff's Exhibit T.)

sorting either on the scows or as discharging from the scows, as it was desired to unload this material with the greatest dispatch in order that the boat might not be delayed.

It would be considerably cheaper for this company to re-handle and sort material than to delay the ship by taking time to sort as the scows were being unloaded. As it was, we had to work double shift in order to unload the scows as fast as they could be loaded by the boat; inasmuch as they could load the scows from two or three of the hatches therefore we had no time whatever for sorting.

Had we unloaded the Kentra on the dock and hauled material the expense would have been unquestionably considerable more than the expense slips which have been turned in to me.

As I have previously informed you, the dry dock material is not as yet placed on the pier from which it will be erected.

Referring to the 7th paragraph of Mr. Pilsbury's letter regarding sinking of the piers, will state, that as the material came out of the Kentra it was more or less mixed, that is to say—we would get a hold of some of the ship shed's material and also some of the dry dock material. It was impossible to unload the ship shed material at the ship shed site and then tow the scow over to the pier upon which we expect ultimately to store the dry dock material for unloading this portion of the load.

(Bill of Exceptions—Plaintiff's Exhibit T.)

It was at this dock that we expected to unload direct from the ship all of the dry dock material.

Referring to Mr. Pilsbury's statements regarding his talks with Mr. Dean, will state that Mr. Poole and I discussed this situation very carefully before Mr. Dean went to Prince Rupert in the presence of Mr. Dean, and after visiting the site personally I feel that Mr. Dean has unloaded these boats in the cheapest possible manner, considering conditions at the site.

You will note that from the 10th paragraph of Mr. Pilsbury's letter that very good dispatch was obtained in unloading the Kentra, and I think that you will agree with me that this could not have been done had some of Mr. Pilsbury's other suggestions been followed out.

Referring to the 11th paragraph of his letter, there was no intention on my part in taking photographs from positions which showed advantageously to us, as the photographs which I had taken I think show pretty clearly the actual conditions on the dock.

Mr. Steele will investigate very carefully Poole-Dean's bill for extra labor over and above that contemplated by their proposal to me, and also the Pacific Stevedoring & Contracting Co.'s bill for extra labor over and above that contemplated by their contract.

With reference to your letter of March 2nd, I note Capt. Gibson's remarks, and wish to advise

(Bill of Exceptions—Plaintiff's Exhibit T.)

you that Poole-Dean did not go into this matter without thoroughly appreciating the situation, as Mr. Poole and I spent three days in Prince Rupert and went over this situation very carefully. In fact, we made our bid contingent upon the work being completed and the site being in a condition, as per information we received from the Grand Trunk Pacific's representatives, with whom we talked.

You may be assured that I will not pass for payment any bills for extra work which I do not believe are entirely just, and Poole-Dean shall not receive payment for any work as extra work which was originally contemplated by their bid.

I was with Mr. Poole when this bid was made up, and know exactly what was included in his bid, and shall therefore watch this matter very carefully.

Referring to Mr. Donnelly's letter of the 27th, I wish to advise you that I have not made any overstatement of conditions, as you have been presented with only facts which are corroborated by photographs I have sent you.

I remain,

Very sincerely yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

Contracting Manager."

CCO-C

(Bill of Exceptions—Plaintiff's Exhibit U.)

Thereupon plaintiff introduced in evidence a letter dated July 20, 1914, which was identified by the witness, received in evidence and marked "Plaintiff's Exhibit U," which is as follows:

(Plaintiff's Exhibit U)

“UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Portland, Oregon, July 20, 1914.

Subject: Prince Rupert Terminal Buildings.

Mr. W. H. Stratton,

U. S. Steel Products Co.,

New York City.

Dear Sir:

Mr. Poole has just returned from a trip to Vancouver, and has reported to me upon the condition of the site at the present time.

When we met with Mr. Donnelly in Seattle some weeks ago he stated that Mr. Poole could begin riveting up the cross frames for the dry dock, and that the pontoons would be ready just as soon as Mr. Poole was ready.

Mr. Poole informs me that the crews are working on two of the pontoons, and that one of them will be ready for launching in about a month, and it is hard to tell when any more will follow.

From his talks with the man in charge of the work on the pontoons Mr. Poole estimates that it will be eight or nine months before the pontoons will be completed.

Bill of Exceptions—Plaintiff's Exhibit U.)

There is no foundation in as yet for the coal storage house, and they are just beginning foundations for the large shear leg.

Mr. Poole will finish up the work which he has under erection in about a month, and will then be obliged to withdraw his crews and wait until sufficient progress has been made to warrant him going to work again.

As to the riveting up of the cross-frames, there are about 48,000 rivets to drive and I estimate about two weeks' time would enable Mr. Poole to have the frames riveted up complete.

Mr. Poole is going to be put under considerable expense laying off crews and having his equipment tied up at Prince Rupert for the next six months, and as this is due wholly to non-deliverance of the sub-structures in proper condition to begin erection, I think it would be in order to notify the Railroad Co. that we shall expect an extra covering the cost of idle equipment and transportation of men because of the enforced layoff.

As to paint on the dry dock material, Mr. Poole looked this over very carefully and states that it is in very poor condition, and furthermore tells me that some of the material looks as if it had been lying exposed without paint for several years. Of course this is not the case, but the information he gives me simply shows the effect of the salt water on this material under the exposed conditions.

I think it would be well if this question of paint

(Bill of Exceptions—Plaintiff's Exhibit U.)

is up to us, for us to take immediate steps to re-paint the material, but this is going to be a very expensive operation, inasmuch as the material is piled up and of necessity all of the material will have to be re-handled.

I have had no reply to my recent letters to you regarding this subject, in which I asked you to inform me whether or not we should paint the material and if so to forward the paint and instructions as to how same should be applied.

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

CCO-C

Contracting Manager."

Thereupon plaintiff introduced in evidence a letter dated May 29th, 1914, which was identified by the witness, received in evidence and marked "Plaintiff's Exhibit V," which is as follows:

(Plaintiff's Exhibit V)

“UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Portland, Oregon, May 29, 1914.

Subject: Grand Trunk Pacific Terminal Bldgs.
Prince Rupert.

Mr. W. H. Stratton,
U. S. Steel Products Co.,
New York City.

Dear Sir:

I met Mr. Donnelly in Seattle last Monday morning, and stated plainly to him the condition of the site when Mr. Poole and I were in Prince Rupert to look over the site in anticipation of making a bid on the erection.

I stated to him the promises which were made to me by Mr. Pillsbury as to how we could expect to find the site when the steel should arrive.

Mr. Donnelly made some few comments upon the statements which were made by Mr. Poole and myself, and told me, as he told you and Mr. Edwards: ‘That anyone could have anything he had, but they had to take it away from him.’

I thought from this that there was no use in any further talk with Mr. Donnelly, and after chatting with him for a while, I left him with the plain statement of facts upon which we based our proposal.

Very truly yours,
BRIDGE AND STRUCTURAL DEPARTMENT,
CCO-C Contracting Manager.”

(Bill of Exceptions—Plaintiff's Exhibit W.)

Thereupon plaintiff introduced in evidence a letter dated September 24, 1914, which was identified by the witness, received in evidence and marked "Plaintiff's Exhibit W," which is as follows:

(Plaintiff's Exhibit W)

“UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Portland, Oregon, September 24, 1914.

Subject: Prince Rupert Work.

Mr. W. H. Stratton,

U. S. Steel Products Co.,
New York City.

Dear Sir:

Referring to your letter of July 20th regarding extra handling on Prince Rupert work, will state that after going to Prince Rupert in company with Mr. Overmire and discussing the situation with Mr. Pillsbury, who advised that the dredging would be completed and any portion of the dock desired would be available for unloading and storing the steel until wanted for erection, Mr. Poole laid out his plans for handling the material as follows:

The foundry, machine shop, blacksmith shop and power house, which were to be shipped first, were to be unloaded onto the pier on which the shear leg derrick is to be erected, and allowed to lie there until needed at the building sites. Mr. Poole allowed in his estimate \$1.00 per ton for moving this

(Bill of Exceptions—Plaintiff's Exhibit W.)

material into position for erection. His intention was to erect the foundry building first, then move his equipment over and erect the machine shop and blacksmith shop, and then the power house; after which would follow the ship shed and dry dock.

Instead of the above procedure being followed, the only available space for the first vessel to berth was where the Buena Ventura and Kentra landed, and on account of the congested condition of the dock, the only place for unloading this material was at the points A, B, C and D as shown in the sketch accompanying my report on the unloading of the Buena Ventura and Kentra.

After this material was unloaded, Mr. Pillsbury instructed Mr. Dean to move it from the dock in order to make room for discharging the Kentra, which instructions Mr. Dean followed at once. This was done before the idea of using scows in connection with the Kentra had been conceived. Mr. Dean moved this material to the points shown on the sketch referred to. The machine and blacksmith shop sites were not at that time ready, so it was impossible to place the steel for these buildings in position for erection, nor could this be done in connection with the power house, as it would have been necessary to set up a derrick for this work. The only trestle across the unfilled space from the dock to the foundry site, was the one which carried the track shown in my sketch; so it was

(Bill of Exceptions—Plaintiff's Exhibit W.)

necessary for Mr. Dean to use this track for transporting the foundry building material from the dock.

On account of the fact that this track was in use for other purposes, he was not allowed to throw it over onto the building site and thus deliver the steel directly onto the site in one move. He absorbed the cost of handling the machine shop material on account of its proximity to the site after he had moved it; but he figured it would cost as much to handle the material for all the buildings, after the above moves, as it would have according to his original plans, on account of the fact that it costs very little more to move a piece of steel two hundred yards than twenty yards, as the handling is the principal cost; and what little was saved in distance was fully offset by his having to rehandle the machine shop material.

I therefore fully believe that the handling of the material for the foundry building, blacksmith shop and power house, is a proper charge against the Railroad Company, as this expense was certainly not contemplated by the original plans and was necessitated by conditions not being the same as outlined by Mr. Pillsbury.

In connection with the unloading of the Kentra and Arna, Mr. Overmire and Mr. Poole were given to understand that the boats bearing the ship shed material and the dry dock material could land in front of the launching platform or at the pier

Bill of Exceptions—Plaintiff's Exhibit W.)

where the shear leg derrick is to be erected, and discharge all of their material directly onto the dock. This program was followed out only in regard to 1038 tons of the material which was shipped on the Arna (which was handled at a cost of 64c per ton). As favorable weather conditions prevailed during the time the Kentra was being discharged, this work should have been done at the same price, had the berth at which the Arna rested been completely dredged out at the time the Kentra was unloaded. In this case the dry dock material which was shipped on the Kentra could have been placed where it now lies instead of having to be moved subsequently. At the time the Kentra was unloaded the condition of the dock was so congested that it was impossible to move the dry dock material to where it now lies. It therefore appears to us that the excess amount (over this 64c per ton) in unloading the Kentra, and 935 tons of the material on the Arna, together with the cost of moving the dry dock material from the ship shed site, is properly chargeable to the Railroad Company.

Trusting this gives you the information which you desire, we remain,

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

Contracting Manager.

By C. W. Steel,

Contracting Agent.

CWS-B"

(Bill of Exceptions—Plaintiff's Exhibit X.)

Thereupon plaintiff introduced in evidence a letter dated April 8, 1915, which was identified by witness, received in evidence and marked "Plaintiff's Exhibit X," which is as follows:

(Plaintiff's Exhibit X)

“UNITED STATES STEEL PRODUCTS COMPANY,
PACIFIC COAST DEPARTMENT.

Portland, April 8, 1915.

Mr. W. H. Stratton,
New York Office.

Dear Sir:

Referring to yours of April 2 and commenting on my telegram to you of September 6, 1912, wherein I referred to the present wharf and the filled roadways, will state that at the time I first went to Prince Rupert, Stirratt & Geotz were building the outer pier.

This wharf which I referred to as the 'present wharf,' is the wharf upon which all the material was discharged from our steamers with the exception, of course, of such material as was lightered over the side of the vessel.

This wharf at the time of my telegram of September 6 was sent, was about one-half finished. The contractors had started the wharf from the West end and were building East.

As you have been previously informed, filling behind the wharf had just commenced, and the sites

(Bill of Exceptions—Plaintiff's Exhibit X.)

of the building which are now completed was at that time under several feet of water.

Messrs. Poole, Pillsbury, and myself, stood on this piece of dock with a set of the plans, and Mr. Pillsbury pointed out from the plans the approximate location of the future buildings, and also explained more or less in detail as to when they expected the wharf to be finished and the fill completed.

I, at that time, took up with Mr. Pillsbury the capacity of the dock, in order that I might satisfy myself that all of the construction would be heavy enough to permit of the storage of the material as unloaded from the ships.

It seemed at that time that material would be delivered at Prince Rupert previous to the completion of the fill of the various building sites, and it was our idea that it would be necessary to leave the material on the dock as it was unloaded from the ship until such time as we could move it onto the building sites.

In this connection, I asked that our bid contain a clause that the owners were to supply fill roadways or trestles to the various building sites.

When you stop to consider that the entire area now covered by this plant was under water even at low tide, it must be apparent that our only thought was unloading the material at the docks and leaving it there until we could get on the sites of the various buildings to erect the material.

(Bill of Exceptions—Plaintiff's Exhibit X.)

Mr. Pillsbury informed us as to when he expected to complete the various docks, but could not give us definite information as to when the fill would be completed, and our entire conversation was along the lines of assuring ourselves that the dock would carry the material and that it could be left on the dock until needed.

Mr. Pillsbury pointed out to us the approximate location of the dock alongside of which the floating dry dock was to be moored and alongside of which it could be erected.

We discussed with him the possibilities of unloading and storing the material for the dry dock and the buildings near the dry dock on this pier and no objections whatever were raised. It is both Mr. Poole's and my recollection that in my conversation with Mr. Pillsbury it was distinctly understood that we were to have the use for unloading and storage purposes of the dock to suit our convenience.

Mr. Poole and I even went so far as to discuss with Mr. Pillsbury the possibilities of the building sites not being filled to grade and the necessity of putting in false work upon which to place our equipment while erecting the steel for the buildings so that I know that he did not know at that time just when the fill would be completed to grade.

It is most certain that with the experience Poole has had in erecting work that he would not gamble upon handling and erecting material on a site in a

Bill of Exceptions—Plaintiff's Exhibit X.)

condition such as was this site on the occasion of our first visit to Prince Rupert, and it was for the purpose of obligating the railroad to guaranty us condition upon which he could base a reasonable bid for the work, but we went into this matter of rocks and fill with Mr. Pillsbury in detail.

As soon as Mr. Fey gets back from Prince Rupert, he will gather together the data to submit you a statement as asked for in Mr. Donnelly's letter of March 16. I am very sorry to note that Mr. Pillsbury is attempting to shift the responsibility for this expense and make it appear as if we were willing to make a bid conditional upon certain work being performed by other contractors over which we had no control.

Very truly yours,

BRIDGE AND STRUCTURAL DEPARTMENT,

C. C. Overmire,

O-H

Contracting Manager."

Thereupon witness further testified, referring to the conversation that took place between himself and Pillsbury upon the occasion of witness' visit with Poole at Prince Rupert, that absolutely no agreement had been entered into between witness and Pillsbury in reference to the sites of the buildings and the space available for handling the material.

Witness thereupon was asked how he explained

(Bill of Exceptions—Testimony of C. C. Overmire.)

the inconsistent terms in his letter (Plaintiff's Exhibits "S", "T", "U", "V", "W" and "X"). To this question defendant objected on the ground that said letters, and everything which witness had said concerning the matter, contained merely representations made by the railway's engineers, but no agreement or promise in regard to the site, and because the form of the question would lead the jury to believe that there was an agreement.

Thereupon the Court overruled the objection, ruling that the jury would be the judges as to what constituted the agreement, and would have to take into consideration the correspondence between the parties about the matter and what was said and done between the parties. To this ruling of the Court the defendant thereupon excepted, and said exception was allowed.

Witness further testified, in response to the question previously asked, and in explanation of witness' expression in Plaintiff's Exhibit "X" to the effect that he had taken up with Pillsbury the capacity of the dock in order to satisfy himself that it would be heavy enough to permit of the storage of the material, that witness was figuring upon the basis of delivering the material on the dock and that if it were not a dock of sufficient capacity to sustain the load, there would be no place to unload. Witness further testified, referring to his statement in said Plaintiff's Exhibit "X", that he had asked that defendant company's

Bill of Exceptions—Testimony of C. C. Overmire.)

did contain a clause that the owners were to supply filled roadways or trestles to the various building sites, that the defendant company's bid would have to be on the same general terms as Poole's bid to defendant company; that Poole saw that there was no fill out to the docks, and that it was discussed between them there, that there would be no way of getting the material from the dock to the building sites; that when witness wired Poole's bid to New York, witness specified, as Poole requested him to do, that defendant company's bid stipulate for filled roadways or trestles to the various building sites.

Witness further testified that if defendant company did not get the contract, Poole would not have got the contract; that Poole was a sub-contractor under defendant company; that defendant company had a contract with the Grand Trunk Pacific to furnish and erect this work.

Witness further testified that he had no reason at all for going to Prince Rupert; that defendant company was bidding on this work and so far as they were concerned were going to deliver this material on the docks at Prince Rupert; that witness had been asked to furnish an erecting figure, and got hold of Poole and took him there; that if defendant company did not get the contract, Poole would not get it, and witness' only idea was to have Poole fully informed as to the conditions there at Prince Rupert so that no such thing as this would

(Bill of Exceptions—Testimony of C. C. Overmire.)

come up, so that Poole would know exactly what he was bidding on, and that the bid which witness expected from Poole and wired to New York, and which was incorporated by the defendant company in its proposal to the Grand Trunk Pacific, would cover all expense at the site after the steamers landed and discharged their material; that there was no occasion for the defendant company trying to cover up anything at all; that witness' idea was to get Poole fully informed, so that the bid would be correct. Witness further testified that he paid some bills for moving steel; that there was a move of the foundry building from the front end of the wharf, and they paid these bills to plaintiff company.

Witness further testified that there were a good many complaints made about the condition of the docks; that he went up to Prince Rupert to see about the matter; that he took it up with Pillsbury and the railroad company up there; that Poole had no contract with the railroad company; that Poole had his contract with the defendant company based upon representations made to Poole by the engineer of the railroad company.

Witness further testified that he made absolutely no representations to Poole at all; that he (witness) had nothing to do with the site; that defendant company took the contract under certain terms with the railroad company, and subcontracted to plaintiff company on the same terms.

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified that Poole, and Dean through Poole, had made a great many representations to witness regarding the site, and Poole and witness went to Prince Rupert to see it; that witness saw the dock was badly congested, that on account of the track over the dock, it was impossible to move the material as Pillsbury had promised Poole he could move it; that witness went to a photographer there and asked him to go down and take the pictures, showing generally the site; that witness never went to the site with the photographer; that he asked the photographer to certify to the pictures; that he never saw the pictures until they arrived at his office; that then he sent them East so that Mr. Stratton could present the true position to Mr. Donnelly to substantiate Poole's claim through defendant company for extra work at the site.

Witness further testified that it was necessary for Poole to lay off his crew and stop work because the pontoons were not ready; that at the time Poole made his bid, Poole said that, on account of the international laws, he could not contract for labor in the United States, but would have to take his labor from Vancouver; that witness knew there were no mechanics at Prince Rupert of the kind needed. Witness further testified that the question as to when the work was to be begun on the pontoons, when three pontoons were floated, or two pontoons, was all in the specifications; that plain-

(Bill of Exceptions—Testimony of C. C. Overmire.)

tiff company was ordered to start erection when two pontoons were floated.

Witness further testified that his bid for the furnishing of steel and erecting the same was based upon the specifications of the engineer's plans; that neither in his sub-contract, or in his contract with the Grand Trunk Pacific, did he undertake to do all the work included in those specifications; that the first plans called for a steel stack, which was afterwards changed to a concrete one; that when Poole and witness went over the specifications, they called for a compressor delivering so many feet of free air per minute; that Poole did not have a compressor of that size and, when Poole made his bid to witness, he made it contingent upon the engineer's allowing him to use the compressor he already had; that the specifications called for some sort of patented English paint, about which Poole knew nothing, so that was eliminated from Poole's bid; that plaintiff company did not have to unload the steel from the boat and put it on the dock from the ship's tackle; that the steamship company made a contract with the stevedoring company to release material from the ship's slings. Witness further testified that he paid the stevedoring company for unloading the steel, because there was extra handling there on account of the docks not being ready; that they had to unload the ship onto barges, instead of onto the dock, which was not contemplated in the stevedoring company's

(Bill of Exceptions—Testimony of C. C. Overmire.)

bid to the steamship company, and therefore witness paid the extra cost of that.

Witness further testified that the original specifications provided that between the pontoon and where the caisson sets down on the pontoon, there was to be canvas belting, with tar; that Poole's written bid to witness did not mention that point; that as a matter of fact Poole's first bid covered painting of all the buildings, and the dry dock, and if defendant company had wanted to take advantage of him, they could have forced him to paint the dry dock too, that witness called Poole's attention to it and allowed him to make his bid according to his (Poole's) understanding; that there was no intention to take advantage of Poole and make him do anything that was not in the verbal agreement between Poole and witness; that the defendant company did not assume payment of this matter but had it done by the Grand Trunk Pacific at its own expense. Witness further testified that he did not know whether the specifications under the steel contract covered the furnishing of ballast.

Witness further testified that the dry dock consisted of three sections, the end sections containing three pontoons each, and the center section six pontoons.

Witness further testified, referring to the specifications (Defendant's Exhibit 20), that they provided that the steel erectors should test the dry dock, which was also eliminated from defendant

(Bill of Exceptions—Testimony of C. C. Overmire.)

company's bid; that defendant company did not follow the specifications literally.

Witness further testified that plaintiff company was delayed about two months, because of the fact that the pontoons were not ready for the dry dock; that he thought there was a letter in evidence in which he had instructed plaintiff company to proceed with the work upon the floating of two pontoons. Witness further testified, referring to said specifications (Defendant's Exhibit 20), that they provided for the erection of wings first on three pontoons, then on six pontoons; then on the remaining three pontoons; that the six pontoons were to be worked upon three at a time; that plaintiff company were instructed to go to work when two pontoons were launched instead of three.

Witness further testified that at the time plaintiff company's bid was put in, it was not definitely known how the steel was going to be shipped, although witness and Poole did know that it would undoubtedly come by water; that Poole never inquired of witness whether or not witness wanted two bids, one covering water shipment and the other rail shipment; that witness made no bid to the Grand Trunk Pacific, but simply wired in the erection offer; that he had nothing to do with the furnishing of the steel; that he did not know whether or not defendant company segregated the bid to the Grand Trunk Pacific, making it cover one amount for the furnishing of the steel, and the other for

(Bill of Exceptions—Testimony of C. C. Overmire.)

the erection. Witness further testified that he never told Poole that defendant company had made a profit of Twenty Dollars (\$20) per ton for the erecting of this steel; that Poole told witness that the engineer at Prince Rupert had told him (Poole) that, and that witness denied it; that witness denied it because he knew it was not a fact, having his engineering department's estimate.

Witness further testified, referring to the different blue print Exhibits that had been put in, that they showed field work done on them in the shop, considering that the material came by water; that he never put in a claim to plaintiff company for any riveting on account of the defendant company's having done some of the field work in the shop; that his bid specified what defendant company would furnish; that defendant company did not furnish more than they were required to with reference to the fabricating of the steel. Witness further testified that he and Poole went to Prince Rupert, got the plans, saw them in the engineer's office, went down to the dock, then got these plans and took them to the hotel, where they worked over them for hours; that they went over every detail; that the only detail sheet (Defendant's Exhibit 24) showed the steel absolutely knocked down.

Witness further testified that at that time he told Poole that defendant company would ship this material out as was customary; that Poole knew that it was shipped out as was customary for this

(Bill of Exceptions—Testimony of C. C. Overmire.)
class of material, and that the fabrication, as shown on that detail sheet (Defendant's Exhibit 24), was not customary with the defendant company, or with anyone else; that witness never claimed that the steel as shipped to Prince Rupert was fabricated a great deal more than was customary; that witness had heard the testimony to the effect that the steel was fabricated more than some of the experts would have naturally expected it to be; that witness had never put in any claim to plaintiff company for any rebate.

Witness further testified that the shear leg derrick was never ordered by the Grand Trunk Pacific Railway, but by the Camden Iron Works, of Camden, New Jersey.

Witness further testified that there was never any written contract between the defendant company and the Grand Trunk Pacific Railway Company; that he drew up a written contract for Poole and handed it to Poole, but never gave Poole a written contract; that Poole had asked the witness for a written contract, but that witness did not give him (Poole) one, because defendant company had its contract with the Grand Trunk passed on proposal and acceptance thereof, and so far as the erection was concerned defendant company's proposal was identical with Poole's proposal to defendant company, and defendant company gave Poole an acceptance of his proposal; that Poole's contract referred to the erection only, while defendant

(Bill of Exceptions—Testimony of C. C. Overmire.)

company's acceptance from the Grand Trunk Pacific covered the furnishing and erecting; that witness sub-let the erection to plaintiff company simply by a written acceptance of their proposal.

Witness further testified, in response to further questions by the Court, that the plans and specifications were drawn by the engineers of the railroad company, also the detail (Defendant's Exhibit 24); that the shop details were made out in the drafting room of the American Bridge Company, which is a subsidiary of the United States Steel Corporation, of which the defendant company is the selling agency; that these details are made out in the shops of the Bridge Company before any fabrication takes place; that the material is all cut, the holes punched and the material riveted up in accordance with these details; that these details are simply a guide for the workmen.

**(Redirect Examination of C. C. Overmire
for Defendant)**

Upon redirect examination, witness testified that plaintiff company's price of Eighteen Dollars (\$18) per ton was for the erection and riveting, hauling and painting, as covered in plaintiff company's bid; that after witness received this bid and put it with defendant company's bid to the Grand Trunk Pacific Company, it became a part of defendant company's bid. Witness further testified that plaintiff company, for this Eighteen Dollars

(Bill of Exceptions—Testimony of C. C. Overmire.)

(\$18) a ton, were to receive the material on the dock, haul, erect, rivet and paint, with the exception of the wings of the dry dock, all the structural steel, and turn the completed buildings over to the railroad so far as the structural steel work was concerned.

Witness further testified that only a few shop details have been put in evidence; that if all the shop details were gone through, it would be noticed that the most extraordinary details had been picked out; that the ones in evidence were not the average details by any means; that there are shipments made by rail which are not as completely fabricated as these shipments, and that there are also shipments by water which have none of this fabrication done; that the cost of Six Dollars (\$6) a ton, concerning which a juror had previously inquired, represented what witness thought would be the extra cost of fabricating at Prince Rupert over and above the probable cost of Twelve Dollars (\$12) for fabricating in the United States if shipped by rail.

Witness further testified that it was more expensive to the Bridge Company to ship material in this condition than to ship it more completely fabricated; that there are more packages to handle and more cost to the Bridge plant to ship the material in this way than if it were shipped by rail completely fabricated; that it entails more actual cost and labor than if it were shipped by car; that

(Bill of Exceptions—Testimony of C. C. Overmire.)

the reason the car shipment was not considered in this case was because of the saving in freight and the duty; that at the time the bid was made, there was no railroad to Vancouver; that defendant company was competing against two large Canadian firms who buy the material on this side of the line, there being no rolling mills up there who can furnish it, and who then pay ten per cent (10%) duty on the plain material into Canada; that defendant company had to pay the thirty-five per cent (35%) duty on fabricated material into Canada, and so had to overcome a twenty-five per cent (25%) cost on plain material at the mill; that the Canadian concerns had the same rail route that defendant company had, and the only way defendant company could make it up was by shipping it by water, which was done; that every job is considered separately in defendant company's plans, and that defendant company tries to detail and fabricate them so that the cost of erection, plus the cost of freight, is the minimum; that the reason defendant company shipped by vessel was in order to overcome the advantage which the Canadian concerns had because of their being able to import only the plain material, while defendant company had to export the fabricated material, between which there is a differential of twenty-five per cent (25%) in the duty.

Witness further testified that the ownership of the vessels had absolutely nothing to do with the

(Bill of Exceptions—Testimony of C. C. Overmire.)

fact of shipping the steel by water; that it would have been cheaper for defendant company to have made a charter if it could have found some tramp boat going into that country on which cargo could have been loaded; that with the small amount of tonnage that they had in this contract, it would have been cheaper to have chartered a ship than to have loaded the company's own bottoms. Witness further testified that if a ship of seven or eight thousand (7000-8000) tons capacity has a cargo, a rate can be made for that ship; that if it has to be run from Vancouver to the far north with only fifteen hundred (1500) or two thousand (2000) tons, there is no money in it at all; that it was the same thing as operating a train, whether the train consists of eight (8) cars or eighty (80) cars, it has to be operated, and it would be cheaper to get a rate and not to operate that train; that after the contract was taken, in order to get more tonnage, defendant company took a contract for rails for the Canadian Northern Railroad at Vancouver, and also from the Grand Trunk Pacific, and loaded those rails on the boat with the structural steel. Witness further testified that, as previously explained, this was the furthest north that a charter has ever been made in the world; that a charter could not be arranged to go up there, unless a pretty good sum of money could be guaranteed; that defendant company could not guarantee a cargo, so took their own boats.

(Bill of Exceptions—Testimony of C. C. Overmire.)

Witness further testified that a deck load can be arranged for with the steamship company, provided the hold is loaded in such a way it will permit it; that witness had never heard of a deck load being arranged for around the Horn, nor on a ship that is loaded with steel; that the reason for this was, that the boat would be out of ballast. Witness further testified that if a boat were loaded too high, it will of course go over; and if it were loaded entirely in the bottom and a wave hits the boat, the boat has to come back with the load, and if it is loaded too heavy, it will not come back, and the tendency of the next wave is to tip it over; that the proportion of bulk to load must be right.

Witness further testified, in response to a question from a juror as to how the deck load entered into this case, that there had been testimony that some trusses for local buildings, the High School and O.-W. R. & N. freight shed, had been shipped by water, but that the question as to whether or not it would come as a deck load had not been answered; that defendant company could not have shipped these trusses (assembled), unless they were shipped as a deck load, which, under the conditions, was impossible; that these trusses could have been shipped by putting them in the hold of the boat and laying them down without piling any material on top of them; that the trusses, which were shipped (assembled), were very narrow trusses, which could go in the 'tween deck; that

(Bill of Exceptions—Testimony of C. C. Overmire.)

sometimes long steel beams were shipped by deck load around the Horn; that the only way in which fifty (50) and sixty (60) foot beams could be gotten into Portland by water, before the Panama Canal was available, was by shipping them around the Horn on deck, lashed to the deck; that they were just plain I-beams, which could not be got in the hold; that some of the sailing vessels from Hamburg would have long lengths in them, but witness did not know how they got them in. Witness further testified that the strut for the ship shed (Plaintiff's Exhibit "F") was so shallow, only four (4) feet nine and five-eighths ($9\frac{5}{8}$) inches through, that it had a horizontal stiffness which would permit its being handled in almost any manner and loaded into the ship; that whereas the other trusses had such long members without bracing that they would buckle; that trusses of this kind (Plaintiff's Exhibit "F") could be handled all right up to that measurement, about five (5) feet thick; that it was about thirty-eight (38) feet eleven (11) inches long; that the flat trusses on the power house were of a different construction with all short members, a condition which did not obtain in the hip trusses, and it would be handled in the hold where the hip trusses could not; that these flat trusses came in two pieces, the wider piece being the shorter piece, and the narrower piece the longer piece.

(Bill of Exceptions—Testimony of C. W. Steele.)

Thereupon the defendant, to sustain the issues upon its part, called as a witness one CHARLES W. STEELE, who was duly sworn and testified as follows:

**(Direct Examination of Charles W. Steele
for Defendant)**

Witness testified that he was superintendent of the Columbia Engineering Works, residing in Portland; that he was at Prince Rupert, British Columbia, for a few months in the capacity of inspector of the American Bridge Company, to see that the material was properly unloaded, that the extra claims by the plaintiff company were just, and that the damaged material was straightened; that this was in March and April of 1914. Witness further testified that there was a misunderstanding between plaintiff company and defendant company in regard to the receiving of the material; that defendant company understood that plaintiff company were to receive the material at the ship's slings, whereas plaintiff company understood differently; that in order to settle the matter, defendant company conceded a point and stood the expense of taking the material from the ship's slings and placing it on the dock, so that it would be on the dock as called for in plaintiff company's contract with defendant company. Witness further testified that by the ship's slings, he meant a derrick which lifted the material out of the hold and

(Bill of Exceptions—Testimony of C. W. Steele.)

swings it over the sides of the ship where it is released on the dock; that it was necessary to move this material as fast as the ship's slings reached it, in order that there would be room for taking more material; that otherwise, if it were not removed, the space would soon be so congested that no more could be discharged.

Witness further testified that defendant company wanted a representative there while the material was being discharged; that it was impossible, on account of the absence of Mr. Fey in San Francisco and of Mr. Overmire in New York, at the time the first ships were unloaded for anybody to be there; that just as soon as Mr. Overmire returned from New York, he sent witness to Prince Rupert to check over the bills of plaintiff company and the stevedoring company; that witness checked them over for unloading the first two ships, and stayed there while the third ship was unloaded. Witness further testified that the first ship was the "Buena Ventura," the second ship the "Kentra," and the third ship the "Arna"; that he was there during the time the "Arna" discharged.

Witness further testified that he made arrangements, or assisted plaintiff company, with the Grand Trunk Pacific to get as much space as possible for storing the material on the dock; and after the material was discharged, he stayed there until all the damaged material had been straightened; that there was considerable material dam-

(Bill of Exceptions—Testimony of C. W. Steele.)

aged in transit from being improperly loaded, and some light members had heavy members on them; that it was entirely possible they struck very rough seas coming around the Horn; that considerable damaged material had to be straightened and put into condition so as to be acceptable to the engineers of the Grand Trunk Pacific Railway Company before it could be used; that this expense was chargeable to the steamship company, and that the defendant company paid plaintiff company for this work, and in turn charged it back to the transportation company.

Witness further testified that while at Prince Rupert, he at no time gave any instructions or orders to the plaintiff company as to where they were to store the material; that he assisted plaintiff company in every way possible to get storage space; that he took the matter up with Pillsbury and assisted plaintiff company in every way possible; that in one case, where Pillsbury did not remove a pile of gravel where the space was absolutely necessary, witness hired the work done, had the gravel removed, so that plaintiff company would have that storage space; that witness felt it was the duty of the defendant company to do everything they could to help out the plaintiff company, as they were together in the contract.

Witness further testified that he at no time had the least control over the space that was to be furnished on the site; that such space was all assigned

(Bill of Exceptions—Testimony of C. W. Steele.)

by the Grand Trunk Pacific Railway's engineer in charge, Pillsbury.

Witness further testified that he at no time made any promises or representations to plaintiff company as to reimbursing them for their lack of space. Witness further testified that when he was there, pontoons were under construction; that there were five pontoons under construction while he was there; that there were two built out in the open, and then, as he remembered, they started three under the ship shed; that the Grand Trunk Pacific Railway, under the direction of Mr. Crowell, was building these pontoons.

Witness further testified that he at no time made any promises to plaintiff company as to when these pontoons would be delivered; that that was something entirely beyond his jurisdiction.

Thereupon the defendant, to sustain the issues upon its part, recalled as a witness one FRANK EDWARD FEY, who having been already duly sworn, testified as follows:

**(Direct Examination of Frank Edward Fey,
Recalled for Defendant)**

Witness testified that he was by occupation a contracting agent; that the first time he went to Prince Rupert was in August, 1914, in connection with the space available for piling the frames of

(Bill of Exceptions—Testimony of Frank E. Fey.)

the wings for the pontoons, as Donnelly contended that Poole did not have to lay off his crew and quit work, but could go ahead and rivet up the frames of the dry dock; that it was witness' mission up there to ascertain whether or not space was available for Poole to proceed along these lines; that on August 14th, witness arrived at Prince Rupert and took the matter up with Pillsbury.

Witness further testified that he told Pillsbury what Donnelly had requested; that witness said to Pillsbury, "Where will we pile these frames now, if we go ahead and rivet them up"; that Pillsbury replied, "I don't know"; that witness said, "Mr. Donnelly is asking that the Poole-Dean Company proceed with this riveting of these frames, and I want to know where we are going to pile them"; that Pillsbury said, "Well, Mr. Donnelly is running this job. If he asked you to do that, it is up to you to go ahead and do it. I can't contradict his instructions." Witness further testified that when he used the word "we," he did not at all mean that the defendant company were going to rivet frames or pile frames, but that he meant the Poole-Dean Company; that defendant company's contract was with the Grand Trunk Pacific Railway Company, including erection; that ordinarily instructions would originate with Donnelly, would come through witness' office, and be transmitted to plaintiff company; that it was on behalf of the plaintiff

(Bill of Exceptions—Testimony of Frank E. Fey.)

company that witness went to Prince Rupert to see about this space.

Witness further testified that he at no time made any promises to plaintiff company as to the furnishing of space; that Poole knew, as well as witness, that the space and pontoons were absolutely under the control of Donnelly, and that defendant company could not give them space unless Donnelly would give it to the defendant company.

Witness further testified that he did not see any steel arrive; that none of the boats were unloaded while he was there; that he remembered Poole's coming to the office and taking the matter of fabrication up with Mr. Overmire; that that had nothing to do with witness' trip to Prince Rupert; that when witness went to Prince Rupert, Poole was not there, but Dean was in charge of the work for the plaintiff company; that Dean made no representations and had no conversation with the witness on the subject of fabrication.

Witness further testified that he made no promises to Dean as to reimbursing plaintiff company for its work in fabricating the steel, or anything of the kind.

Witness further testified, referring to Defendant's Exhibit 22, that he made that sketch, showing where the pontoons were being built by the Grand Trunk Pacific Railway, upon the occasion of his first visit to the site; that there were two pontoons under construction at that time out in the open; that the

(Bill of Exceptions—Testimony of Frank E. Fey.)

Grand Trunk Pacific expected to launch them in a little bay and then float them around to the dock. Witness further testified that he never made any promises or entered into any understanding with the plaintiff company as to the furnishing by the defendant company of any of these pontoons; that defendant company had no control whatever over the pontoons; that they were delivered by the Grand Trunk Pacific Railway, and were being built by them.

Witness further testified that he went to Prince Rupert the second time in 1915, leaving Portland on Easter Sunday; that the reason he went that time was to find out why plaintiff company was not proceeding with the erection of the wings of the dry dock as rapidly as Donnelly stated they should be operating; that witness went to Prince Rupert at the request of Mr. Overmire, whose request came from Mr. Stratton, whose request came from Donnelly. Witness further testified that he went to Prince Rupert and, after looking over the conditions and the number of riveters working on the wings in comparison with the amount of work that had already been done ahead of the riveters, it looked as though the riveters were lost; that he reported these conditions to Mr. Overmire, suggesting that more riveters be put on by the plaintiff company, which was done; that after witness got the riveters, the gangs were driving four thousand rivets per day, which was satisfactory to Donnelly, and that from

(Bill of Exceptions—Testimony of Frank E. Fey.)

then on the work was progressing to Donnelly's satisfaction; that witness expected at that time to remain in Prince Rupert only until this matter had been straightened out, but that Donnelly insisted that a representative of defendant company remain on the job until its completion, and consequently witness remained there during April, May, June and July, during 1915, until the work was completed; that Dean left the work two weeks after the witness, but that the work was all completed after witness left.

Witness further testified that while there he was acting as a representative of the defendant company, to see whether or not Donnelly's criticism as to the progress of the work were just; that witness got Dean to speed up his men and to put on more men; that the work after that went along satisfactorily for the consulting engineer.

Witness further testified that at no time did he ever have any control over the space that was allotted for sorting or handling the steel delivered from the ships; that Poole knew it; that Pillsbury, representing Donnelly, had control of this matter; that Pillsbury took his instructions from Donnelly; that, in other words, Donnelly was running that job.

Witness further testified that, after plaintiff company had started to assemble steel on the first three pontoons, the work progressed without any delay from then on and, as fast as plaintiff company would finish up one section, the pontoons would be

(Bill of Exceptions—Testimony of Frank E. Fey.)

available to continue upon the next section. Witness further testified that he was familiar with the details surrounding the claim of the plaintiff company for delay caused by failure to receive the pontoons in time; that plaintiff company did not want to start on these pontoons until they had three of them, and that three of them were not completed when the buildings had been erected and accepted.

Witness further testified that he was familiar with the circumstances surrounding plaintiff company's claim in this case for Four Hundred Dollars and Seventy cents (\$400.70) for extra work; that some little houses on top of the wings were to be extended and some extra material furnished, that there had to be extra work in the field connecting up the members constituting this extension; that the material, which had already been shipped, had not been punched and prepared for receiving these connections for the extension, which would naturally cause extra work for drilling the holes for receiving the extension; that these extensions were not contemplated or provided for in the original contract. Witness further testified that there was other extra work applying to shop and drafting room errors; that, in preparing details like these, draftsmen are liable to make a mistake and get some of the holes a little off, which requires drilling in the field, or the shop may make a little error; that these bills were all paid and approved by defendant company to the plaintiff company; that on any erection job, the

(Bill of Exceptions—Testimony of Frank E. Fey.)

erector expects to find little mistakes like that, which are customary, but the man having the contract for furnishing the steel assumes those bills and pays them as an error that will creep in in preparing the details or preparing work in the shop.

Witness further testified that this claim of Four Hundred Dollars and Seventy cents (\$400.70) had nothing to do with the items about which he had just testified, where the error occurred on the part of the defendant company, but was strictly a Grand Trunk Pacific requirement; that it was work which Donnelly ordered done, extra work of drilling holes and putting the extension on the little houses. Witness further testified that plaintiff company put in a claim to defendant company for this extra work; that the work was done while witness was in Prince Rupert, and time was kept on it, and the bills were made out and approved by the witness as to the labor on the work; that by approving bills, witness meant that he saw that the time and the rate were all right. Witness further testified that these bills were made out by Dean and presented to witness while witness was in Prince Rupert, that witness transmitted them to Mr. Overmire with witness' approval, and that Mr. Overmire in turn transmitted them to New York to charge against the Grand Trunk Pacific Railway or through Donnelly's office. Witness further testified that he told Poole that this work was work ordered by Donnelly, and should be paid for by the railway.

(Bill of Exceptions—Testimony of Frank E. Fey.)

Witness further testified that he at no time promised to pay Poole, or promised Poole that the defendant company would pay him, for this work; that witness did not know whether the bill heading showed that plaintiff company rendered the bill against defendant company, or whether it was just made out without any heading; that the bills were all made out and presented to witness by Dean in Prince Rupert; that after witness returned to Portland, he asked Dean to present his bills direct to the Grand Trunk Pacific, in other words, to send them to Pillsbury, and let him approve them, and then send them on to Donnelly, which Poole did.

Witness further testified that the reason he asked Poole to present his bills direct to the Grand Trunk Pacific was because defendant company had paid Poole for all of defendant company's extra work, and this was something ordered by Donnelly.

(Cross Examination of Frank Edward Fey, Recalled for Defendant)

On cross examination, witness testified that when he went to Prince Rupert, work had not been started on the dry dock; that the time, when the crews looked lost on the dry dock, was on witness' second trip; that witness went up to Prince Rupert because Donnelly was not satisfied with the progress being made on the erection of the steel; that Donnelly had made threats to defendant company of turning the plant over to the British Army and of

(Bill of Exceptions—Testimony of Frank E. Fey.)

doing the work himself, and of keeping plaintiff company's employes off the plant; that witness went up and got Dean to put on extra crews to hurry up the work; that the work was completed ahead of time.

Witness further testified that he was up at Prince Rupert just between boats on the first trip, and four months on the second trip; that on the second trip, the job was practically all cleaned up; that Mr. Steele was up there two months; that Mr. Overmire went up a couple of times, and Mr. Steele went up on or two times besides; that there was an item in the specifications (Defendant's Exhibit 20) concerning having a representative of the defendant company up there to look after their interests; that in that particular instance, defendant company did not comply with the specifications; that defendant company thought it could take care of its interests by sending a man up once in awhile to see, so long as there was not any controversy; that they could get along that way.

Thereupon defendant rested its case.

Thereupon, in rebuttal, plaintiff recalled as a witness one OTHO POOLE, who, having been duly sworn, testified as follows:

**(Direct Examination of Otho Poole,
Recalled in Rebuttal for Plaintiff)**

Witness testified that there was no charge made in this case for fabricating the steel in the dry dock; that it came as witness expected it would come; that there was only one way in which it could be shipped, and that was knocked-down. Witness further testified, referring to the photographs in evidence (Defendant's Exhibits A, B and C), that they showed steel about the same as the steel that was shown at Prince Rupert, plates and channels and things like that. Witness further testified that the wings of the dry dock were approximately fifteen (15) feet wide at the bottom and could not be shipped fabricated on a car; that the short sections of the dry dock were about one hundred and thirty-three (133) feet long, on three (3) pontoons. Witness further testified, referring again to the said photographs (Defendant's Exhibits A, B and C), that they seemed to show all sorts of space afforded the contractor in which to sort the material; that he did not have anything like that space for laying out the material at Prince Rupert; that that was all he had asked for, room to lay the material out as shown in said photographs; that in said photographs it looked as if the steel had been sorted out.

Witness further testified, referring to Defendant's Exhibit 19, that it showed a general outline of the truss after assembling, and an end view of one of the small buildings; that he could not tell from an examination at all how many rivets would be

(Bill of Exceptions—Testimony of Otho Poole.)

driven in the shop and how many in the field; that the drawing did not even show the space between rivets; that no shop man could take that plan and build a truss from it; that the size of the bottom chords were not even given; that the columns did not show any rivets; that there was nothing shown, except an outline of what the truss would look like after the truss was assembled; that it did not show how many sections the truss would come in; that he never saw that plan.

**(Cross Examination of Otho Poole, Recalled
in Rebuttal for Plaintiff)**

On cross examination, witness testified that in building up the wings of a dry dock in sections, the plates are riveted on the frames; that the wings could not have been prepared in sections; that they were one hundred and thirty-three (133) feet long and thirty-five (35) feet high; that it was cut into several parts, but that the way the plates and things break, it would not have been practical to rivet any of them together; that the frames stood up thirty-five (35) feet high, and then the plates went on, fastened on to each of the frames; that the channels, to which the plates were riveted, came in one length; punched and sent out to be put together in the field; that the channels were all in one piece, approximately thirty-five (35) feet long.

Witness further testified that the pieces which were fastened to the channels could not have been

(Bill of Exceptions—Testimony of Otho Poole.)

riveted together in the shop, that they were too long, fifteen (15) feet long; that after the frame work is got together, it is about ten (10) feet wide at the top and fifteen (15) feet wide at the bottom, one side straight up and down, that when the frame is got together it would be approximately thirty-five (35) feet long, ten (10) feet wide at the top and fifteen (15) feet wide at the bottom; that it would be too big to ship if it were riveted up; that if all the angles had been cut in two and some riveting done, it could have been done in the shop; that these photographs only showed stuff that would go in a dry dock.

Witness further testified that before he put in his bid, he saw the engineer's general plans.

Witness further testified, in response to questions by the Court, that the steel was to be delivered on the dock to him, and that an argument came up about that; that when the ship arrived, he got a wire that on board dock meant ship's slings; that he refused to touch the material, and that defendant company paid for handling it; that the stuff was to be delivered to him on the dock; that the ships were to get it there and unload it, and that at that time he did not know whether the stuff would get in two (2) or three (3) months before he would get on the job, or how it would be there; that he supposed that the material would be delivered to him, would be left on the dock when the ship went in and discharged it, and that he could go in and

(Bill of Exceptions—Testimony of Otho Poole.)

take it from there; that defendant company paid him for taking the material from the ship's side and landing it on the dock, also for moving it again to make room for some other cargo. Witness further testified that he was supposed to take the stuff and erect, to have one handling on it; that if he had had room enough to spread the stuff out when he was handling it, he would have had only one handling of it; he would have sorted it out and could have taken it out, but instead of having room to sort it out, the plates were all piled up, in making the first handling from the ship, as the stuff came off the ship. Witness further testified that defendant company paid him for taking the material from the ship's slings; that he could not distribute the steel so he could pick it up and handle it advantageously, because there was not enough space; there was hardly room enough to land the stuff off the boat; that there were lumber, gravel and concrete piles, and everything else on the dock; that the only space he could get was any space that could be found that was left; that, according to his contract, it was defendant company's duty to land the stuff on the dock for him, with plenty of space so that when he came there he could handle it to advantage.

**(Redirect Examination of Otho Poole,
Recalled in Rebuttal for Plaintiff)**

Upon redirect examination, witness testified, referring to Defendant's Exhibit 14, that it showed

(Bill of Exceptions—Testimony of Otho Poole.)

the members coming knocked-down; that no charge was made for fabricating them, because they had to be shipped knocked-down.

Thereupon plaintiff rested its case, and this concluded the testimony in the case.

Thereupon defendant moved the Court to instruct the jury to return a verdict for defendant, which motion the Court overruled, and to this ruling of the Court the defendant excepted, and the exception was allowed.

Thereupon defendant moved the Court to instruct the jury to return a verdict for the defendant upon the first alleged breach of contract and cause of action, which motion the Court overruled, and to this ruling of the Court the defendant excepted, and the exception was allowed.

Thereupon defendant moved the Court to instruct the jury to return a verdict for the defendant upon the second alleged breach of contract and cause of action, which motion the Court overruled, and to this ruling of the Court the defendant excepted, and the exception was allowed.

Thereupon defendant moved the Court to instruct the jury to return a verdict for the defendant upon the third alleged breach of contract and cause of action, which motion the Court overruled,

(Bill of Except'ns—Instruct'ns Requested by Def't.)

and to this ruling of the Court the defendant excepted, and the exception was allowed.

Thereupon the defendant moved the Court to instruct the jury to return a verdict for the defendant upon the fourth alleged breach of contract and cause of action, which motion the Court overruled, and to this ruling of the Court the defendant excepted, and the exception was allowed.

Thereupon, before the jury retired, defendant requested the Court to charge the jury as follows:

(Instructions Requested by Defendant)

I.

This controversy grows out of an agreement between defendant and the Grand Trunk Pacific Railway in which defendant agreed to furnish all structural steel for the erection of certain buildings for said Railway at Prince Rupert, British Columbia, and to erect said steel all according to certain plans and specifications in writing. These plans and specifications thereby became a part of the defendant's contract. The defendant reserved the right to sublet the erection of the steel and did sublet this part of its contract to the plaintiff. Thereby the contract between the plaintiff and defendant became in all respects subject to the plans and specifications according to which the original contract between the defendant and the Railway Company was awarded and the plaintiff is conclusively presumed to know

(Bill of Except'ns—Instruct'ns Requested by Def't.)

and is bound by everything contained in the plans and specifications which relate to the erection of the steel.

II.

There are four distinct causes of action joined by plaintiff in this case (although five are stated in the complaint), growing out of four alleged breaches of contract on the part of defendant. First (numbered I in the complaint) plaintiff alleges that defendant agreed to deliver the steel completely fabricated, but failed to do so, and later agreed to have plaintiff charge defendant for the necessary fabrication, but failed to pay such charge. This alleged breach of the contract, set forth in the first cause of action does relate to the steel delivered for the dry dock. It is admitted that the steel for the dry dock was fabricated according to the contract. This first cause of action, therefore, in which plaintiff claims damages in the sum of \$3330.69 is limited to the fabrication of the steel for the foundry, coal storage, blacksmith, boiler and machine shop building and the ship shed. The second alleged breach of contract is set forth in the complaint in the two causes of action numbered therein II and III. These two causes of action should be considered together, as they are claims for damages for alleged delays on the part of the defendant in furnishing pontoons for the dry dock upon which the steel was to be erected. For these alleged delays plaintiff claims

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damages in the sum of \$2123.64 as the rental value of its plant for the period extending from September 1, 1914, to November 4, 1914, and also claims damages in the sum of \$918.00 for moneys which it claims it was compelled to expend in paying transportation for employees to and from Vancouver, B. C. There is no claim that the steel for all the buildings, except the dry dock, was not furnished in time. The next alleged breach of the contract contained in the cause of action numbered IV in the complaint is that the defendant agreed to furnish storage space for the steel for the dry dock, but failed to do so. This cause of action, therefore, is limited to the steel for the dry dock and it is admitted that the plaintiff has no complaint for lack of space furnished for the steel for all other buildings. The cause of action numbered V in the complaint is based not upon the original contract but upon the new contract not covered by the original contract at all. In this the plaintiff claims that the defendant ordered some work done, which the plaintiff did; that this work amounted to the sum of \$400.70 and that the defendant has refused to pay for the same.

III.

There is no question between the parties that the pontoons upon which the dry dock were to be erected should be furnished by the Grand Trunk Pacific Railway and not by the defendant, and the defend-

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ant owed to the plaintiff no duty to furnish such pontoons at any particular time, but only when the same were furnished to it, the defendant, by the Grand Trunk Pacific Railway. The evidence shows, without contradiction, that any delay in furnishing the pontoons was not due to the defendant but to the Grand Trunk Pacific Railway Company. I therefore charge you that the plaintiff cannot recover for the alleged delays in furnishing the pontoons and your verdict upon the second and third causes of action must, therefore, be for the defendant.

IV.

In regard to the fabrication of the steel for the buildings other than the dry dock, I charge you that the parties did agree that the steel for these buildings should be fabricated by the defendant at the shops; that is to say, should be assembled and riveted together at the shops to the same extent to which similar steel for similar work when transported by ship is ordinarily or usually fabricated; that is to say, usually assembled and riveted. This is a question of fact to be determined by you upon the evidence submitted. The burden of proof upon this question is upon the plaintiff.

V.

A letter from the plaintiff to the defendant dated November 7, 1913, and the answer to the same dated November 11, 1913, both of which are in evidence

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define the extent to which the steel should be fabricated, assembled and riveted. I charge you, therefore, that it was the duty of the defendant to fabricate, assemble and rivet steel to the same extent to which similar steel for use in similar buildings is usually fabricated, assembled and riveted when the same is to be transported by ship for export. Whether the steel was so fabricated, assembled and riveted is a question of fact which you will determine from the evidence. You will understand, however, that there is no question between the parties that the steel for the dry dock was fabricated, assembled and riveted in all respects as required by the contract between the parties.

VI.

The contract between the parties provides that the steel shall be delivered on the dock. It does not provide that any space should be furnished by the defendant for storing, assorting, or handling the steel. The plaintiff was under the contract to receive steel on the dock and to do all things necessary after it was received to erect the building according to the plans and specifications. This included the handling and assorting of the steel wherever necessary. I charge you, therefore, that there was no obligation on the part of the defendant to furnish space for this purpose and that you will, therefore, find a verdict for the defendant upon the fourth cause of action.

(Bill of Except'ns—Instruct'ns Requested by Def't.)

VII.

The fourth cause of action, as I have stated, grows out of a new and independent contract. It is admitted that the plaintiff did the work and that the value of this work was \$400.70. It is contended on the part of the defendant that the orders to do this work were issued by the Grand Trunk Pacific Railway and were merely transmitted by the defendant to the plaintiff. If you find from the evidence that this work was ordered by the Grand Trunk Pacific Railway and the orders merely transmitted to the plaintiff by the defendant, then the defendant will not be liable to plaintiff for the value of this work. This is a question of fact to be determined by you from the evidence and the burden of proving that the work was performed for the defendant is upon the plaintiff.

VIII.

In regard to the extra work for which the plaintiff claims \$400.70, the defendant alleges in its answer that plaintiff presented a claim for this work in said sum to the Grand Trunk Pacific Railway Company, that the claim was allowed by the Grand Trunk Pacific Railway Company and that the defendant was indebted to the Grand Trunk Pacific Railway Company in a sum exceeding \$400.70 and the amount of this bill was allowed to the plaintiff as a credit upon its indebtedness to the Grand

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Trunk Pacific Railway Company. If you find from the evidence that the plaintiff did present a claim for this sum to the Grand Trunk Pacific Railway Company and this claim was allowed, that at the time that it was allowed the plaintiff was indebted to the Grand Trunk Pacific Railway Company in a sum exceeding \$400.70 and that this sum was allowed to the plaintiff as a credit upon such indebtedness, then I charge you that the plaintiff has received compensation for this extra work in this sum and that it cannot recover from the defendant.

IX.

You are instructed that it was the duty of the Railway, and not of defendant, to furnish pontoons for the dry dock wings, and that plaintiff was not bound to begin erection work on said wings until three pontoons had been furnished plaintiff by the Railway. You are also instructed that plaintiff was bound to do all its work upon said wings under the direct supervision of the Railway and was bound to carry out the instructions of the Railway concerning such work. Defendant had no right to give instructions or to exercise supervision over such work except as and when acting on behalf of the Railway. Therefore, if you find that plaintiff was delayed in erecting said wings by lack of sufficient pontoons, or if you find that plaintiff was instructed to begin erecting said wings before three pontoons had been

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furnished to plaintiff, in either case your finding will not show any breach of legal duty on the part of defendant, and your verdict upon the second alleged breach of contract and cause of action must be for defendant.

Thereupon the Court refused to give the instructions requested by the defendant, or any of them, and to the Court's refusal to give said instructions, and to the Court's refusal to give each of them, the defendant then and there excepted, and the exceptions were allowed.

Thereupon the Court charged the jury as follows:

(Instructions Given by the Court)

"Gentlemen of the Jury:

The Court will instruct you touching the law of the case for your guidance when you come to deliberate upon your verdict, which will be based upon the evidence that has been adduced at the trial of this cause.

This is an action by Poole-Dean Company, which is a corporation, against the United States Steel Products Company, which is also a corporation.

Before proceeding to the issues in the case, there are certain preliminary matters that I will allude to for your guidance.

(Bill of Exceptions—Instructions Given by Court.)

In the first place, the Grand Trunk Pacific Railway Company let a contract to the United States Steel Products Company for the furnishing of the steel and materials with which to construct these certain buildings which have been spoken of; and under that contract, the United States Steel Products Company was to fabricate the steel on the ground as it came from the mill and to erect the steel into the buildings. This contract was let under certain plans and specifications, which had been drawn up by the Grand Trunk Pacific Railway Company, and of course the United States Steel Products Company was to be governed and controlled in the erection of these buildings, or the performance of its contract, by those plans and specifications.

Subsequently, as you have heard here detailed, the United States Steel Products Company sublet to the plaintiff, Poole-Dean Company, the fabrication of this steel on the ground, whatever was to be done about it in that line, and the erection of these buildings by putting the steel in place. That is about the contract, as I understand it, or the sub-contract. And of course reference at the time was made to these plans and specifications which had been drawn by the Grand Trunk Pacific Railway Company, and, so far as it pertained to the work that Poole-Dean Company undertook to do, those plans and specifications were to control the operation of the work of Poole-Dean Company, as

(Bill of Exceptions—Instructions Given by Court.)

well as the work of the defendant company under its contract from the Grand Trunk Pacific Railway Company.

Now then, with that in view, the plaintiff here has alleged that it (Poole-Dean Company) entered into this contract, or the sub-contract, with the defendant company, and has set out four specific causes of action, all of which have relation to the one contract. That is to say, under the theory of the plaintiff, the plaintiff made one contract with the defendant company, and that one contract is set out, I might say by piecemeal, in the first, second, third, and fourth causes of action. So when you look to the contract, the statement of it by the plaintiff is comprised in the four causes of action. I want to get that plain before you so that you may determine what the contract is in the end.

Now, there are certain parts of that alleged contract that are contained in writing. I have reference to the letter of November 7, 1913, which was written by the Poole-Dean Company, through Otho Poole, to the United States Steel Products Company. That letter sets out that, "It is our understanding we are to erect, rivet and paint two coats on main buildings for \$18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and calk for \$18.00 per ton of 2000 pounds, all material to be delivered to us on dock at building site." That is the principal part of the letter. That letter was answered by a letter from the Bridge

(Bill of Exceptions—Instructions Given by Court.)

and Structural Department of the defendant company, through C. C. Overmire, Contracting Manager, wherein he states: "Your understanding is, in accordance with ours that: you are to haul, erect and rivet the steel for the buildings, for \$18.00 per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet and calk the steel work for the wings of the dry dock, for \$18.00 per net ton of 2000 pounds."

Those letters are a part of the contract, but they do not include the whole contract which it is alleged that the parties entered into between themselves. Nor is there any writing, that I remember of, other than these, in the evidence, from which the Court can conclude that the entire contract is in writing. If the Court could so conclude, it would be the duty of the Court to construe the contract, and not for you. But, as it is not entirely in writing, then it becomes the duty of the jury, or the province of the jury, to determine what the contract is; not alone from the writings, but from the verbal evidence that has been offered to you upon the stand. So that, in order to determine what the real contract was between these parties, or the agreement as to the fabrication on the ground and the erection of this steel, you must take into consideration, not only these two letters that I have read from, but other letters that may bear upon the subject, and all the verbal testimony given by

(Bill of Exceptions—Instructions Given by Court.)

the parties and by those persons whom they have called to corroborate them, and determine from the whole what the contract is.

I will say to you further, gentlemen of the jury, that the plaintiff in this case has the burden of proof in establishing the contract as it has been alleged by it; that is to say, it must establish the contract by a preponderance of the evidence given in the case. And I may say now that what we mean by preponderance of the evidence is that the plaintiff must produce such an amount of evidence as will carry the scales of justice down upon its side. If the scales stand exactly at balance, it has not produced a preponderance of the evidence. If they go down upon its side, then plaintiff will prevail. If they go down upon the other side, then of course plaintiff cannot prevail in this case.

Now, another item that I will refer to is that it appears by the testimony in the case that the fabrication and erection of the steel in the dry dock is not concerned in this case, because it is admitted by the plaintiff that that steel came and was delivered upon the ground as fully fabricated as the plaintiff expected it to be fabricated. So that the matter concerning the erection and the delivery of the steel fabricated, as designed by one party or the other, relates to the buildings other than the dry dock.

Now, I will go more specifically into what the

(Bill of Exceptions—Instructions Given by Court.)

issues of the case are, so as to direct your attention to what must be determined in the end.

It is alleged by the plaintiff that on or about September, 1912, plaintiff and defendant entered into a contract whereby plaintiff agreed to furnish labor and equipment to erect and paint the structural steel to be used in the machine-shop, boiler-shop, power-house, and other bulidings of the Grand Trunk Pacific Railway Company at Prince Rupert, British Columbia, at an agreed price of \$18 per ton, said steel to be fabricated at the factory and delivered to plaintiff for erection. To be more specific, it is further alleged that it was understood that the steel should be completely fabricated when delivered to plaintiff, but that if fabrication was necessary other than for the erection of the steel, plaintiff should be allowed a reasonable amount for such extra work. Then it is further alleged that it was later discovered that the steel shipped would not be received completely fabricated; whereupon plaintiff notified defendant that plaintiff would charge for extra work required in fabricating said steel, and defendant promised and agreed that the matter would be satisfactorily adjusted between them. Then it is alleged further that plaintiff fabricated and assembled the steel for the coal storage building at an actual and reasonable expense of \$166.95; for the ship shed at the reasonable expense of \$1896.16; for the blacksmith shop at the expense of \$579; for the power-house \$207.39; and

(Bill of Exceptions—Instructions Given by Court.)

for the foundry building \$481.14; aggregating \$3330.69.

Now, these are the allegations of the plaintiff as to the first cause of action.

Answering this cause of action the defendant, after setting out that the Grand Trunk Pacific Railway Company had let to the defendant the contract for furnishing materials and construction of certain buildings at Prince Rupert, alleges that plaintiff submitted to defendant written proposals for the performance of a part of said contract, which proposals were accepted in writing, and that said proposals and acceptance do now constitute the contract between plaintiff and defendant mentioned in the complaint. Then it is alleged that the contract was, namely, that plaintiff was to haul, erect and rivet steel for the main buildings at Prince Rupert, to furnish and apply thereto two coats of paint as per specifications, and to haul, erect, rivet, and calk the steel work for the wing of the dry dock, and the defendant was to deliver all steel work to plaintiff on dock at Prince Rupert, and to pay plaintiff \$18 per ton for the work of riveting and erection. It is then further alleged that said contract was entered into between the parties upon the express understanding that defendant should deliver said steel to plaintiff by water transportation, as completely fabricated as it was the defendant's custom to ship by water transportation similar steel for similar work, that said steel was

(Bill of Exceptions—Instructions Given by Court.)

by defendant so delivered on the dock at Prince Rupert, and that defendant has complied in all respects with its obligation.

Thus are set forth the contentions and the issues of the parties as it respects the first cause of action.

It will be noted that the parties are in practical accord as it respects the agreement for riveting and erecting the steel at the price of \$18 per ton. The essential difference between them relates to the manner and the state of completion as it respects fabrication in which it was agreed that the steel should be delivered to the plaintiff. As you will see, the plaintiff contends that the agreement was that the steel should be delivered completely fabricated, and that if extra work was necessary plaintiff would be allowed a reasonable amount for the extra work of fabrication. On the other hand, the defendant contends that it was the understanding that said steel should be fabricated as defendant was accustomed to fabricate steel that was designed to be shipped by water transportation, and that said steel was so fabricated and delivered to the plaintiff.

The plain and simple issue, then, is, as it pertains to this first cause of action, whether the agreement was as the plaintiff states it or as the defendant states it.

The agreement, whatever it was, was concluded between Mr. Poole, acting for the Poole-Dean Company, and Mr. Overmire, acting for the United

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States Steel Products Company, and they are the principal witnesses speaking to the negotiations leading up to the agreement. Other witnesses have been called pro and con, and have lent corroboration to the one side or the other, but the principal factors in the negotiations and the final consummation of the agreement are these two men.

Much evidence has been directed towards the manner and the degree of completeness in which the steel was fabricated at the shop. It is the theory of the defendant that this depends upon whether it was designed that the steel should be transported by rail or by water; if by rail, that it would be more completely fabricated than if it were designed to be carried by water transportation; but in any event, that the steel would not be wholly fabricated at the shop, and there would always be left a certain amount of fabrication to be done in the field. The plaintiff combats this theory to a certain extent, and claims that the steel should have been more completely fabricated than it was fabricated and delivered upon the ground.

You have listened to a great amount of testimony on this subject, and the detail drawings which have been exhibited for your enlightenment show pretty clearly the extent of the fabrication at the shop, and to what extent the material was fabricated when transported and delivered to the plaintiff. I need not go more fully into the evidence on this subject, as you will remember what it is. But

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in the end you must determine what the agreement of the parties was as it pertained to the amount of fabrication that should be done, or should have been done, before the delivery of the steel to the plaintiff.

To repeat, plaintiff says in its complaint that the steel was to be completely fabricated, and that, if extra work was necessary other than such fabrication as was required for erection, plaintiff would be allowed a reasonable amount for such extra work; and plaintiff further says that, when it was ascertained that the steel would not be delivered completely fabricated, defendant was notified that plaintiff would make a charge for the extra work in fabrication, and that thereupon defendant, through its agent Overmire, promised and agreed that the matter would be satisfactorily adjusted, and instructed plaintiff to proceed with the work. On the other hand, defendant says that it was understood that the steel was to be delivered to plaintiff as completely fabricated only as it was defendant's custom to fabricate the same when to be carried to the place of delivery by water transportation, and as similar steel for similar work was fabricated.

If the agreement was as plaintiff states it, bearing in mind that plaintiff must establish the agreement as it has alleged it to be by a preponderance of the evidence, then the plaintiff must prevail, and your verdict will be accordingly on that count. But

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if the agreement was as defendant contends, then your verdict will be for the defendant.

This as it pertains to the first cause of action. If you find for the plaintiff on this cause, you will find in amount what such extra services in fabrication were reasonably worth. The plaintiff would be entitled in such event to the reasonable value of the extra services only.

Now, the second cause of action as set out by the amended complaint repeats the contract as to the erection of the steel at the agreed price of \$18 per ton, and then it goes on to allege: "The erecting to begin when three pontoons had been floated in said dry docks and that at the time such contract was entered into plaintiff and defendant went over the ground and it was understood and agreed that defendant would not order plaintiff to begin work on the job until such time as plaintiff could, when starting the building, for said Grand Trunk Pacific Company, continuously keep at the work until the completion of the job and that in the event that there were any delays to plaintiff in said work the defendant would reimburse plaintiff for such delays, and it was further understood and agreed that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Company; that plaintiff was thereafter instructed by defendant to commence work and plaintiff did commence work upon

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the buildings and completed the same before three pontoons of the dry docks had been floated, and because of the premature instructions of the defendant and the delays in the completing of said pontoons, plaintiff's equipment was compelled to lie idle and remain in disuse for a period of time extending from September 1st, 1914, to November 5th, 1914, and that the reasonable rental of said equipment for said period of time was \$2123.64."

Now, the second cause of action is based upon that last allegation, that the plaintiff's equipment was compelled to lie idle, and that by reason of that fact the plaintiff was entitled to the reasonable rental of the equipment.

If you should find for the plaintiff upon that cause of action, the measure of damage would not be the reasonable rental of the equipment, but it would be the lawful interest upon the value of the equipment during the time that the equipment was compelled to lie idle.

Now, the third cause of action repeats what I have read to you practically, but the cause for relief is based upon the allegation that, "because of the premature instructions of the defendant and the delays in the completing of said pontoons, plaintiff's equipment was compelled to lie idle and remain in disuse for a period of time extending from September 1st, 1914, to November 5th, 1914, making it necessary for plaintiff to return the laborers who were employed upon the work at Prince Rupert,

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British Columbia, to Vancouver, British Columbia, and pay the railroad expenses and wages of said men while in transit to Vancouver, British Columbia, at a cost of \$918." So that that cause is based upon the alleged fact that the plaintiff was compelled to transport these men to and fro by reason of the delay caused by the alleged action of the defendant company.

In the fourth cause of action it is alleged that defendant would reimburse plaintiff for such delays, and "it was further understood and agreed that defendant would furnish plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Company." And for that the plaintiff claims that it is entitled to recover the sum of \$2459.

Now, to these three causes of action, the second, third, and fourth, the defendant interposes a defense to this effect: That "said specifications provided, and said contract between plaintiff and defendant was made with the express understanding, that the construction operations on said main buildings and wing of dry dock should at all times be under the full control and management of the Grand Trunk Pacific Railway and its officers and agents." And it is further alleged that, "It was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said

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contract between plaintiff and defendant was made with the express understanding, that the pontoons for the wing of the dry dock should be furnished and provided by Grand Trunk Pacific Railway and not by defendant, and said pontoons are the pontoons mentioned in plaintiff's said amended complaint; and it was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that space for storing, assorting, and handling said steel on the dock of Grand Trunk Pacific Railway at Prince Rupert, British Columbia, should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant."

So the defense, then, to these three causes of action is based upon the alleged fact that the plaintiff, and that it was so understood by and between the plaintiff and defendant, should look to the Grand Trunk Pacific Railway Company for these rights and privileges, and that it was not to look to the defendant company; that is to say, that the plaintiff was to look to the Grand Trunk Pacific Railway Company for the furnishing of this space that is complained about, and for the time of the beginning of the work, and for the other things that are alleged in these three causes of action, and not to the defendant company. This, of course, is based upon the fact that the Grand Trunk Pacific

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Railway Company was making these improvements, and that the contract of the defendant company was made with the Grand Trunk Pacific Railway Company to furnish the materials and to erect the steel in the buildings.

And I might say this, in this relation, however: That if it had been the defendant company who was erecting this steel into the buildings, it might be inquired whether or not it was not the duty of the Grand Trunk Pacific Railway Company to furnish adequate space for handling the steel. If that was the case, then the inquiry may be extended—a sub-contract having been let to the plaintiff company to erect this steel and put it into the buildings, whether or not the defendant company did not assume the obligation that would have rested upon the Grand Trunk Pacific Railway Company in the first instance of providing adequate space for the carrying on of the work in riveting this steel and in putting it into the buildings. I submit that, gentlemen of the jury, for your consideration, along with the alleged contract and the denials thereof, for determination as to whose duty it was to furnish space—whether or not that was a duty devolving upon the defendant company, or whether or not the plaintiff was to look to the Railway Company alone for furnishing that space, and not to the defendant.

Now, there was one other cause of action, which is simply that the plaintiff, at the request of the

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defendant, did certain extra work which is set out in the complaint, amounting to \$400.70. It is claimed by the defendant company that that work was not done for it at all, but that it was done for the Grand Trunk Pacific Railway Company, and that the Grand Trunk Pacific Railway Company is alone responsible for the payment, and not the defendant company. This you will consider, and determine from the evidence what the fact is about that, and return your verdict on it.

There is a good deal of evidence consisting of letters and documents that have been offered in evidence;—the letters, a number of them passing from Mr. Overmire to his own company,—touching the contract and relations between Poole-Dean Company and the defendant company, and all these you will take into consideration in the consideration of what your verdict shall be in the case. And when you have concluded what that is, you will reduce it to writing and return it into Court.

Gentlemen of the Jury, in this Court, in civil cases as well as in criminal cases, it requires a unanimous concurrence of all the jurors in order that you may return a verdict. So you must agree unanimously upon what your verdict shall be. It is not like the State Court in civil cases, because in the State Court a certain proportion of the jurors may prevail, or find a verdict."

Thereupon defendant excepted to certain matters of law contained in said instructions as given by the Court, which matters at law were comprised in the following part of said instructions, to-wit:

“Now, to these three causes of action, the second, third, and fourth, the defendant interposes a defense to this effect: That ‘said specifications provided, and said contract between plaintiff and defendant was made with the express understanding, that the construction operations on said main buildings and wing of dry dock should at all times be under the full control and management of the Grand Trunk Pacific Railway and its officers and agents.’ And it is further alleged that, ‘It was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that the pontoons for the wing of the dry dock should be furnished and provided by Grand Trunk Pacific Railway and not by defendant, and said pontoons are the pontoons mentioned in plaintiff’s said amended complaint; and it was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that space for storing, assorting, and handling said steel on the dock of Grand Trunk Pacific Railway at Prince

Rupert, British Columbia, should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant.'

So the defense, then, to these three causes of action is based upon the alleged fact that the plaintiff, and that it was so understood by and between the plaintiff and defendant, should look to the Grand Trunk Pacific Railway Company for these rights and privileges, and that it was not to look to the defendant company; that is to say, that the plaintiff was to look to the Grand Trunk Pacific Railway Company for the furnishing of this space that is complained about, and for the time of the beginning of the work, and for the other things that are alleged in these three causes of action, and not to the defendant company. This, of course, is based upon the fact that the Grand Trunk Pacific Railway Company was making these improvements, and that the contract of the defendant company was made with the Grand Trunk Pacific Railway Company to furnish the materials and to erect the steel in the buildings.

And I might say this, in this relation, however: That if it had been the defendant company who was erecting this steel into the buildings, it might be inquired whether or not it was not the duty of the Grand Trunk Pacific Railway Company to furnish adequate space for handling the steel. If that was the case, then the inquiry may be extended—a sub-contract having been let to the plaintiff company to erect this steel and put it into the buildings,

whether or not the defendant company did not assume the obligation that would have rested upon the Grand Trunk Pacific Railway Company in the first instance of providing adequate space for the carrying on of the work in riveting this steel and in putting it into the buildings. I submit that, gentlemen of the jury, for your consideration, along with the alleged contract and the denials thereof, for determination as to whose duty it was to furnish space—whether or not that was a duty devolving upon the defendant company, or whether or not the plaintiff was to look to the Railway Company alone for furnishing that space, and not to the defendant.”

Thereupon defendant's said exception to said matters at law contained in the instructions given by the Court was allowed.

Thereupon the case was argued by counsel for the respective parties, and submitted to the jury under the instructions of the Court.

WHEREUPON the Court now being willing to preserve the record in order that its rulings and each of them may be reviewed for error, if any there be, now certifies that the foregoing Bill of Exceptions contains all of the evidence offered or admitted on the trial, together with the rulings of the Court and all of the instructions given by the Court, as well as all of the instructions requested by the defendant, and the following exhibits :

Plaintiff's Exhibits "B", "C", "D", "E", "F", "N", "O", "P", "Q" and "R", and Defendant's Exhibits 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, A-21, A-22, 20, "A", "B" and "C", and that the same conforms to the facts.

WHEREUPON this Bill of Exceptions is now here settled, certified and signed this 9th day of January, 1917, and the same is hereby directed to be filed.

CHAS. S. WOLVERTON,
District Judge.

Filed January 9, 1917. G. H. Marsh, Clerk.

AND AFTERWARDS, to-wit, on the 12th day of January, 1917, there was duly filed in said Court, a Stipulation, in words and figures as follows, to-wit:

*In the District Court of the United States
for the District of Oregon.*

Stipulation

It is hereby stipulated by and between the parties hereto by their respective attorneys that the transcript of record prepared herein, containing citation on writ of error, writ of error, amended complaint, answer, reply, verdict, judgment, motion for a new trial, order denying motion for new trial, petition for writ of error, order allowing writ of error, staying proceedings, and fixing amount of bond, supersedeas bond, assignment of errors, and bill of exceptions as prepared by counsel for defendant and plaintiff in error herein, is correct, and that the Clerk of the District Court of the United States for the District of Oregon may certify to the correctness thereof without comparing the same, or any part thereof, with the original pleadings and records on file in his office in the above entitled Court.

E. L. McDOUGAL,

Attorney for Plaintiff and Defendant in Error.

TEAL, MINOR & WINFREE,

ROGERS MAC VEAGH,

Attorneys for Defendant and Plaintiff in Error.

Filed January 12, 1917. G. H. Marsh, Clerk.

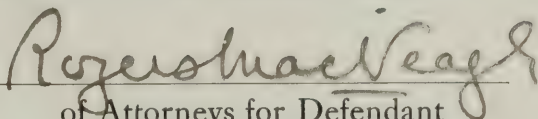
I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, and in accordance with the stipulation signed and filed on the 12th day of January, 1917, by the plaintiff in error and the defendant in error, by their respective attorneys, do hereby certify that I have not compared the foregoing printed Transcript of Record with the original thereof in the case in said Court of Poole-Dean Company, a corporation, plaintiff and defendant in error, against United States Steel Products Company, a corporation, defendant and plaintiff in error, but that the same is a full, true, and correct Transcript of the record and proceedings (without comparison) in said Court in said cause, as the same appear of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and the seal of the above entitled Court this
6th day of February, 1917.

G. H. MARSH,
Clerk.

[SEAL]

I hereby certify, that the within is a full, true, and correct copy (and the whole thereof) of the original Transcript of Record in the above entitled cause.

A handwritten signature in dark ink, reading "Rogers MacVeagh", is written over a horizontal line.

of Attorneys for Defendant
and Plaintiff in Error.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES STEEL PRODUCTS COMPANY,
a Corporation
PLAINTIFF IN ERROR

VS.

POOLE-DEAN COMPANY, a Corporation
DEFENDANT IN ERROR

Brief on Writ of Error for Plaintiff in Error

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Filed

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F. D. Monckton,
Clerk.

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United States Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES STEEL PRODUCTS
COMPANY, a corporation,
Plaintiff in Error,

v.

POOLE-DEAN COMPANY, a corporation,
Defendant in Error.

Brief on Writ of Error for
Plaintiff in Error

STATEMENT

In 1912, the Grand Trunk Pacific Railway Company sent out specifications and invited bids for the construction of a proposed terminal at Prince Rupert, British Columbia. The site selected was a deep bay, ringed with hills, the harbor of a town (Prince Rupert), which the Railway intended developing as its terminus although its line was not yet built. The program proposed included a large dock system, power house, machine shop, boiler and blacksmith shop combined, cold storage shed, a large ship shed of peculiar design, and a dry dock in three sections floating on pontoons.

"Referring to your conversation with our Mr. Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific Buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection."

"As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert."

"Our formal contract with you for the erection will be drawn up as soon as conditions permit."

(Defendant's Exhibit 2—Poole-Dean to Company, November 7, 1913.)

"It is our understanding we are to erect, rivet and paint two coats on main buildings for \$18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and caulk for \$18.00 per ton of 2000 pounds, all material to be delivered to us on dock at building site."

(Defendant's Exhibit 3—Company to Poole-Dean, November 11, 1913.)

"Your understanding is, in accordance with ours that: you are to haul, erect and rivet the steel for the buildings, for Eighteen Dollars (\$18.00) per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet and caulk the steel work for the wings of the dry dock, for Eighteen Dollars (\$18.00) per net ton of 2000 pounds."

"All steel work to delivered to you on dock at Prince Rupert, B. C."

All of these letters were written and received before Poole-Dean began to make any arrangements to do any work.

It will be seen that these letters constitute: first, a proposal by Poole-Dean, dated November 16, 1912; second, a statement by the Company that Poole-Dean would receive the order, dated March 24, 1913; third, a recapitulation by Poole-Dean of the terms of their contract, dated November 7, 1913; and fourth, a confirmation by the Company, dated November 11, 1913, of Poole-Dean's recapitulation. There is no dispute as to the accuracy of these letters, nor as to their contents.

About the 18th or 19th of November, 1913, Poole, who had in the meantime received the detail sheets governing the erection work, in company with Dean, took them up to Mr. Overmire's office and complained that they showed more fabricating and

assembling work to be done in the field than he had anticipated. The following day Dean, then associated with Poole in the management of Poole-Dean, left for Prince Rupert and work was begun by Poole-Dean at the site upon Dean's arrival there.

Besides the complaints from Poole-Dean concerning the degree to which the steel had been fabricated before shipment, complaints were made to the Company from time to time of difficulties and delays experienced owing to the congested condition of the site and the consequent lack of storage space for the steel. During September and October, 1914, Poole-Dean, claiming that the erecting work had reached a point where it could not continue until certain pontoons for the floating dry dock should be delivered, shut down operations and shipped away a number of workmen who had to be brought back or replaced when the work was resumed in November, 1914. Subsequently certain changes in the work were ordered by the Railway's engineer, which necessitated the doing of extra work by Poole-Dean during April, May, June, and July, 1915. It is undisputed that Poole-Dean from time to time billed the Railway directly for the cost of this extra work, and that these bills were approved by the Railway and the amount thereof either paid to or credited upon certain indebtedness owed by Poole-Dean to the Railway.

Claims were presented to the Company by Poole-Dean purporting to cover the cost of the fabricating and assembling which Poole-Dean asserted should

have been done in the shop, and other claims for expenses alleged to have been incurred by Poole-Dean owing to the lack of storage space and the shut-down in 1914. Refusal by the Company to entertain these claims resulted in the present action, in which Poole-Dean included a claim for the extra work already credited by the Railway.

The facts out of which arises the disagreement between the parties are largely undisputed. There is, as has been stated, no question as to what work Poole-Dean's contract with the Company called for their doing. The work was completed satisfactorily; the steel was delivered by the Company according to agreement. It is admitted that the congested condition of the building site was due solely to the simultaneous carrying on by the Railway of other construction work in addition to that on which Poole-Dean was engaged; the delay in furnishing the pontoons is also admitted to have been solely the fault of the Railway, which was building them, as, under its own specifications, it was to furnish them itself; and it is not denied that Poole-Dean received credit from the Railway for the extra work. The underlying grounds of the dispute, when reduced to their lowest terms, involve, therefore, the following questions:

1. Was any agreement made by Mr. Overmire for the Company, not contained in the letters constituting the written contract between Poole-Dean and the Company, as to the degree to which the steel

would be fabricated and assembled for the buildings other than the dry dock before delivery to Poole-Dean; and, if so, what was this agreement and was it violated by the Company?

2. Is the Company liable for the Railway's failure to deliver pontoons at any time, or for the consequent damages and expenses which resulted therefrom?

3. Is the Company liable for the congested condition of the docks and building site and the consequent lack of space for storing the steel?

4. Is the Company liable for the cost of the extra work ordered by the Railway, billed by Poole-Dean to the Railway, and credited by the Railway to Poole-Dean?

SPECIFICATIONS OF ERROR

Assignments of error are found on pages 36 to 53 of the transcript. We shall take these up in order.

I.

A letter dated November 10, 1915, from Poole-Dean to the Company marked Plaintiff's Exhibit "I" is found in the transcript on page 75. This letter refers to a telephone conversation regarding the charge for rehandling the dry dock material and explains that the cost of handling and sorting this material was due to the crowded condition of the dock. It further states that in making its proposal Poole-Dean estimated cost of handling and

sorting at 90 cents a ton, aggregating \$2213.10 and showing the additional cost over estimate of \$3216.22, billing to the Company \$2459.00 of this expense and absorbing the remainder, \$757.22. The specific objection made to this evidence was that it allowed the plaintiff to base the excess cost upon its estimate made prior to the letting of the contract. It is also open to the objection that it appears from this letter that the handling and sorting of the material was a part of the duty of Poole-Dean, as is shown by the contract in writing, and therefore it tends to contradict the written contract.

II.

The second error is predicated upon the introduction in evidence of Plaintiff's Exhibit "L," a letter from the Company to Poole-Dean dated December 2, 1913. This letter was written by C. W. Steele as contracting agent. The substance of the letter was to authorize Poole-Dean to receive material and states that extra charges on this account should be arranged between Poole-Dean and Overmire. This material was not material for the dry docks. Furthermore, the letter relates only to the receipt of material from the ship's tackles, not to handling and sorting. There was no claim in the complaint for any damages on this account, and therefore this letter did not concern any of the issues.

III.

The third specification of error relates to the question propounded to C. O. Dean (transcript, page 114). This question was directed to the estimate made by Poole-Dean of the cost of handling the steel, assuming that there was sufficient space on the dock. The objection was that the question was not material, as it could make no difference what such estimate was. The answer of the witness was that the estimate was 90 cents a ton providing he had plenty of space.

IV.

The next assignment of error is directed to the question propounded to the witness Charles O. Dean, also directed to this estimate, and the witness answered that 90 cents was a reasonable price and that there was a profit in it at 90 cents a ton provided they had space; that it cost about \$1.38 extra per ton to move the steel because of the congested condition of the yards, and that is how he computed the amount at \$2459.00. This evidence is clearly in conflict with the contract and it was also based upon the estimate of the cost made by Poole-Dean at the time it submitted its bid.

V.

The plaintiff had offered in evidence certain letters written by Overmire to Stratton, Exhibits "S," "T," "U," "V," "W" and "X" (transcript, pages

298 to 319), and was asked by the counsel for plaintiff how he explained the inconsistent terms in these letters. This question was objected to upon the ground that the letters and everything which the witness had said concerning the same contained merely representations made by the Railway engineers but no agreement or promise in regard to the site, and that the question would lead the jury to believe that there was an agreement. In overruling the objection the *court stated that the jury should be the judges as to what constituted the agreement and would have to take into consideration the correspondence between the parties in regard to the matter and what was said and done between the parties.* While this question was objectionable inasmuch as it indicates that there was some agreement in regard to the site made between the parties to the controversy, which was not the fact, the chief error is that the court in passing on the matter ruled that this correspondence, not between the parties but between Overmire and his own Company, and dated long after the contract was made, was competent and should be taken into consideration to determine what constituted the agreement, and that what was said and done between the parties as well as the writings should be taken into consideration by the jury, and that the jury were to be judges of what constituted the agreement, thus submitting this question of law to the determination of the jury and submitting moreover, in order to determine what a contract was, matters which

occurred between the parties long after the contract was made and while the contract was being performed.

VI.

The sixth assignment of error is the refusal of the court to instruct the jury to return a verdict for the defendant. The contention of the Company is that the contract is contained in the several letters beginning November 16, 1912, and ending with letter of November 11, 1913. That the evidence on the part of the plaintiff showed no breach on the part of the defendant in this contract and therefore a verdict for the defendant should have been directed.

VII.

Assignment VII is directed to the error of the court in refusing to charge the jury to return a verdict for the defendant upon the first cause of action. This is based upon the same contention made in regard to assignment of error VI, *supra*, and it is unnecessary to repeat the same.

VIII.

Assignment of error VIII is directed to the refusal of the court to instruct the jury to return a verdict for the defendant upon the second cause of action. The second cause of action was for alleged failure on the part of the Company to furnish space for sorting and handling the steel for the dry

dock wings. The contract clearly specifies whose duty it should be to handle the steel, and nowhere in the contract is anything said in regard to space being furnished by the defendant. The parties clearly understood that the steel should be delivered on the dock. The defendant, therefore, is entitled to a directed charge upon this cause of action.

IX.

The third alleged breach of contract and cause of action is really the same as the second alleged breach and cause of action containing only another element of damage for the same alleged breach. The failure to direct a verdict upon this therefore is open to the same criticism as assignment numbered VIII.

X.

Assignment X is based upon the refusal of the court to direct a verdict for defendant upon the fourth alleged breach of contract. The breach in this case is claimed to be due to delays in furnishing the pontoons, an obligation resting not upon the defendant but upon the Railway. There was no evidence showing any obligation upon the defendant to furnish the pontoons. Indeed the plaintiff shows that he understood from the specifications themselves that the pontoons were to be furnished by the Railway. The contract does not provide that the defendants should furnish pontoons. We there-

fore submit that upon this cause of action the defendant was entitled to a directed verdict.

XI.

Assignment XI is directed to the refusal of the court to give the following instruction (transcript, pages 41-42) :

“This controversy grows out of an agreement between defendant and the Grand Trunk Pacific Railway in which defendant agreed to furnish all structural steel for the erection of certain buildings for said Railway at Prince Rupert, British Columbia, and to erect said steel all according to certain plans and specifications in writing. These plans and specifications thereby became a part of the defendant’s contract. The defendant reserved the right to sublet the erection of the steel and did sublet this part of its contract to the plaintiff. Thereby the contract between the plaintiff and defendant became in all respects subject to the plans and specifications according to which the original contract between the defendant and the Railway Company was awarded, and the plaintiff is conclusively presumed to know and is bound by everything contained in the plans and specifications which relate to the erection of the steel.”

A part of this charge was given by the court (transcript, pages 360-361), but in its charge the

court stated that the defendant was to "fabricate the steel on the ground as it came from the mill" and to erect the steel into the buildings. Under the contract the defendant was not to fabricate the steel on the ground as it came from the mill. It was to fabricate the steel and to erect the same into the buildings.

XII.

The twelfth assignment of error is directed to the refusal to give the charge found on pages 42 to 44 of the transcript, as follows:

"There are four distinct causes of action joined by plaintiff in this case (although five are stated in the complaint), growing out of four alleged breaches of contract on the part of defendant. First (numbered I in the complaint) plaintiff alleges that defendant agreed to deliver the steel completely fabricated, but failed to do so, and later agreed to have plaintiff charge defendant for the necessary fabrication, but failed to pay such charge. This alleged breach of the contract set forth in the first cause of action does relate to the steel delivered for the dry dock. It is admitted that the steel for the dry dock was fabricated according to the contract. This first cause of action, therefore, in which plaintiff claims damages in the sum of \$3330.69 is limited to the fabrication of the steel for the foundry, cold storage, blacksmith, boiler and machine shop

building and the ship shed. The second alleged breach of contract is set forth in the complaint in the two causes of action numbered therein II and III. These two causes of action should be considered together, as they are claims for damages for alleged delays on the part of the defendant in furnishing pontoons for the dry dock upon which the steel was to be erected. For these alleged delays plaintiff claims damages in the sum of \$2123.64 as the rental value of its plant for the period extending from September 1, 1914, to November 4, 1914, and also claims damages in the sum of \$918.00 for moneys which it claims it was compelled to expend in paying transportation for employees to and from Vancouver, B. C. There is no claim that the steel for all the buildings, except the dry dock, was not furnished in time. The next alleged breach of the contract contained in the cause of action numbered IV in the complaint is that the defendant agreed to furnish storage space for the steel for the dry dock, but failed to do so. This cause of action, therefore, is limited to the steel for the dry dock and it is admitted that the plaintiff has no complaint for lack of space furnished for the steel for all other buildings. The cause of action numbered V in the complaint is based not upon the original contract but upon the new contract not covered by the original contract at all. In this the plaintiff claims that the de-

fendant ordered some work done, which the plaintiff did; that this work amounted to the sum of \$400.70 and that the defendant has refused to pay for the same."

We submit that this charge states clearly what were the issues between the parties. A part of this charge was given in its own language to the court but nowhere does the court point out in its charge that the plaintiff had no complaint of lack of space for the steel for any building except the dry dock, and nowhere does the court define the issues to the jury.

XIII.

The thirteenth assignment of error relates to the refusal to give the following charge (transcript, pages 44-45) :

"There is no question between the parties that the pontoons upon which the dry dock were to be erected should be furnished by the Grand Trunk Pacific Railway and not by the defendant, and the defendant owed to the plaintiff no duty to furnish such pontoons at any particular time, but only when the same were furnished to it, the defendant, by the Grand Trunk Pacific Railway. The evidence shows, without contradiction, that any delay in furnishing the pontoons was not due to the defendant but to the Grand Trunk Pacific Railway Company. I therefore charge you that

the plaintiff cannot recover for the alleged delays in furnishing the pontoons and your verdict upon the second and third causes of action must, therefore, be for the defendant."

This charge clearly defines one of the issues presented by the pleadings and we contended that it was the duty of the court to construe and tell the jury what was the contract, and also that it was the duty of the court to direct the jury that inasmuch as the pontoons were not to be furnished by the defendant the plaintiff could not recover anything on account of the failure of the defendant to furnish the same.

XIV.

The fourteenth assignment of error is directed to the refusal of the court to give the following instruction (transcript, page 45) :

"In regard to the fabrication of the steel for the buildings other than the dry dock, I charge you that the parties did agree that the steel for these buildings should be fabricated by the defendant at the shops; that is to say, should be assembled and riveted together at the shops to the same extent to which similar steel for similar work when transported by ship is ordinarily or usually fabricated; that is to say, usually assembled and riveted. This is a question of fact to be determined by you

upon the evidence submitted. The burden of proof upon this question is upon the plaintiff."

The contract being in writing it was necessary for the court to charge the jury what was the contract, but the court having ruled that the contract was not all in writing it then became the duty of the court to charge the jury in regard to what was meant by the terms fabrication at the shops, or, in order to bring the matter within the terms of the contract, to direct the jury what was meant by structural steel or steel for the buildings and dry dock.

XV.

Assignment of error XV is directed to the charge requested and refused found on page 46 of the transcript, as follows:

"A letter from the plaintiff to the defendant dated November 7, 1913, and the answer to the same dated November 11, 1913, both of which are in evidence, define the extent to which the steel should be fabricated, assembled and riveted. I charge you, therefore, that it was the duty of the defendant to fabricate, assemble and rivet steel to the same extent to which similar steel for use in similar buildings is usually fabricated, assembled and riveted when the same is to be transported by ship for export. Whether the steel was so fabricated, assembled and riveted is a question of fact which you will determine from the evidence. You will under-

stand, however, that there is no question between the parties that the steel for the dry dock was fabricated, assembled and riveted in all respects as required by the contract between the parties."

We submit that this charge should have been given not only because of the fact the contract was in writing but also because there was no claim that the steel for the dry dock was not fabricated, assembled and riveted in all respects as agreed.

XVI.

Assignment XVI is based upon the refusal of the court to give the jury the following instruction (transcript, pages 46-47) :

"The contract between the parties provides that the steel shall be delivered on the dock. It does not provide that any space should be furnished by the defendant for storing, assorting, or handling the steel. The plaintiff was under the contract to receive steel on the dock and to do all things necessary after it was received to erect the building according to the plans and specifications. This included the handling and assorting of the steel wherever necessary. I charge you, therefore, that there was no obligation on the part of the defendant to furnish space for this purpose and that you will, therefore, find a verdict for the defendant upon the fourth cause of action."

There was no question that the steel under the contract was to be delivered on the dock. There was no question that the contract provided that Poole-Dean should haul, erect and rivet the steel. It therefore was the duty of the court to charge the jury in regard to the obligation of the plaintiff in this particular and to have directed a verdict for the defendant as requested.

XVII.

Assignment of error XVII is directed to the refusal of the court to give the following charge (transcript, pages 47-48) :

“The fourth cause of action, as I have stated, grows out of a new and independent contract. It is admitted that the plaintiff did the work and that the value of this work was \$400.70. It is contended on the part of the defendant that the orders to do this work were issued by the Grand Trunk Pacific Railway and were merely transmitted by the defendant to the plaintiff. If you find from the evidence that this work was ordered by the Grand Trunk Pacific Railway and the orders merely transmitted to the plaintiff by the defendant, then the defendant will not be liable to plaintiff for the value of this work. This is a question of fact to be determined by you from the evidence and the burden of proving that the work was performed for the defendant is upon the plaintiff.”

The Company thinks that there is no question in regard to this matter. The extra work was not covered by any contract between the plaintiff and the defendant. The work was outside of the Company's contract with the Railway Company. Poole-Dean Company had assumed to do all the work of erecting and it had been understood that this part of the work the Company should sublet. Therefore in so far as this extra work is concerned Poole-Dean Company did this work not for the Company but for the Railway.

XVIII.

Assignment of error XVIII is directed to the refusal to give the charge found on pages 48 and 49 of the transcript, as follows:

"In regard to the extra work for which the plaintiff claims \$400.70, the defendant alleges in its answer that plaintiff presented a claim for this work in said sum to the Grand Trunk Pacific Railway Company, that the claim was allowed by the Grand Trunk Pacific Railway Company and that the defendant was indebted to the Grand Trunk Pacific Railway Company in a sum exceeding \$400.70 and the amount of this bill was allowed to the plaintiff as a credit upon its indebtedness to the Grand Trunk Pacific Railway Company. If you find from the evidence that the plaintiff did present a claim for this sum to the Grand Trunk Pacific Rail-

way Company and this claim was allowed, that at the time that it was allowed the plaintiff was indebted to the Grand Trunk Pacific Railway Company in a sum exceeding \$400.70 and that this sum was allowed to the plaintiff as a credit upon such indebtedness, then I charge you that the plaintiff has received compensation for this extra work in this sum and that it cannot recover from the defendant."

What we have said in regard to assignment XVII applies with equal force to assignment XVIII. In addition to this there was no controversy really that the plaintiff did present a claim for this sum to the Railway Company; that the claim was allowed; that at the time it was allowed the plaintiff was indebted to the Railway Company in a sum exceeding the amount of this claim and that the amount of this claim was allowed as a credit upon such indebtedness.

XIX.

Assignment of error XIX is directed to the refusal to charge (transcript, pages 49 and 50), which requested charge is as follows:

"You are instructed that it was the duty of the Railway, and not of defendant, to furnish pontoons for the dry dock wings, and that plaintiff was not bound to begin erection work on said wings until three pontoons had been furnished plaintiff by the Railway. You are also

instructed that plaintiff was bound to do all its work upon said wings under the direct supervision of the Railway and was bound to carry out the instructions of the Railway concerning such work. Defendant had no right to give instructions or to exercise supervision over such work except as and when acting on behalf of the Railway. Therefore, if you find that plaintiff was delayed in erecting said wings by lack of sufficient pontoons, or if you find that plaintiff was instructed to begin erecting said wings before three pontoons had been furnished to plaintiff, in either case your finding will not show any breach of legal duty on the part of defendant, and your verdict upon the second alleged breach of contract and cause of action must be for defendant."

The court did instruct the jury (transcript, pages 360-361) that plans and specifications were to control the operation of the work of Poole-Dean as well as the work of the Company. The specifications were in evidence and in writing and it was therefore the duty of the court to instruct the jury in regard to that part of these specifications which were binding upon Poole-Dean. There is no controversy that the obligation was upon the Railway to furnish the pontoons and that the delay was caused by this failure on the part of the Railway. Therefore it would seem that the instruction requested should have been given.

XX.

The twentieth assignment of error is in the charge of the court found on pages 50 to 52 of the transcript, which is as follows:

“Now, to these three causes of action, the second, third, and fourth, the defendant interposes a defense to this effect: That ‘said specifications provided, and said contract between plaintiff and defendant was made with the express understanding, that the construction operations on said main buildings and wing of dry dock should at all times be under the full control and management of the Grand Trunk Pacific Railway and its officers and agents.’ And it is further alleged that, ‘It was mutually understood and agreed by and between plaintiff and defendant at the times said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that the pontoons for the wing of the dry dock should be furnished and provided by Grand Trunk Pacific Railway and not by defendant, and said pontoons are the pontoons mentioned in plaintiff’s said amended complaint; and it was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with

the express understanding, that space for storing, assorting, and handling said steel on the dock of Grand Trunk Pacific Railway at Prince Rupert, British Columbia, should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant.' .

"So the defense, then, to these three causes of action is based upon the alleged fact that the plaintiff, and that it was so understood by and between the plaintiff and defendant, should look to the Grand Trunk Pacific Railway Company for these rights and privileges, and that it was not to look to the defendant company; that is to say, that the plaintiff was to look to the Grand Trunk Pacific Railway Company for the furnishing of this space that is complained about, and for the time of the beginning of the work, and for the other things that are alleged in these three causes of action, and not to the defendant company. This, of course, is based upon the fact that the Grand Trunk Pacific Railway Company was making these improvements, and that the contract of the defendant company was made with the Grand Trunk Pacific Railway Company to furnish the materials and to erect the steel in the buildings. And I might say this, in this relation, however: That if it had been the defendant company who was erecting this steel into the buildings, it might be inquired whether or not it was not the duty of the Grand Trunk Pacific Railway Company

to furnish adequate space for handling the steel. If that was the case, then the inquiry may be extended—a sub-contract having been let to the plaintiff company to erect this steel and put it into the buildings, whether or not the defendant company did not assume the obligation that would have rested upon the Grand Trunk Pacific Railway Company in the first instance of providing adequate space for the carrying on of the work in riveting this steel and in putting it into the buildings. I submit that, gentlemen of the Jury, for your consideration, along with the alleged contract and the denials thereof, for determination as to whose duty it was to furnish space—whether or not that was a duty devolving upon the defendant company, or whether or not the plaintiff was to look to the Railway Company alone for furnishing that space, and not to the defendant.”

This charge recites the allegations of the answer and then the court charges the jury that it is for its consideration to determine whose duty it was to furnish the space and whether or not it was not the duty of the defendant to furnish the pontoons or whether or not the defendant did not assume the obligation which would have rested upon the Railway Company in the first instance.

ARGUMENT

This action is based upon a contract or contracts and therefore it will be necessary to first ascertain what was the contract or contracts.

CONTRACT.

The contract was made between Otho Poole, representative of the plaintiff, and C. C. Overmire, representative of the defendant. It appears from the testimony of Poole (transcript, page 57) that the matter was first taken up between himself and Overmire in September, 1912; that Overmire called him up to the office and told him that this job was coming up up North and that they would have to *go to Seattle to get plans to figure the job*, and that after they got to Seattle *they found there were no plans there and they went on to Prince Rupert together and got the plans there*, went over the thing and discussed the whole matter, shipping site, etc., while they were there (transcript, page 57). He further testified that at Prince Rupert they saw Mr. Pillsbury, representative of Mr. Donnelly, engineer in charge of the work, and that Overmire asked Pillsbury about space for handling material and Pillsbury assured him that he would have all the space that he needed. This testimony is confirmed by Overmire (transcript, pages 267 to 271). From this evidence it appears that the Grand Trunk Pacific Railway prepared plans and specifications and advertised for bids for certain work to be done at Prince Rupert including all the work the sub-

ject-matter of this contract, except that portion embraced under Cause of Action No. V (extra work). The Company, intending to bid upon this work, wrote to Overmire, its agent in Portland, to get in communication with some contractors and ascertain at what price he could procure the erection of the steel for the buildings at Prince Rupert, mentioned in the complaint. Overmire turned to Poole and they together went to Prince Rupert and remained together until after they returned to Seattle, and during this time Poole-Dean made verbally an offer to Overmire to do this work, which offer is the subject-matter of the contract afterward entered into between the parties. This offer was made before the Company made any bid or proposal to the Railway and the offer bid by Poole-Dean to Overmire was made a part of the bid of the Company, or included in the Company's bid to the Railway Company. *The parties, therefore, may be said to be joint contractors to the Railway, the one to fabricate and furnish the steel and the other to erect the steel when delivered upon the ground.* It was some time, of course, after this when the contract was awarded to the Company, exactly when it was awarded is not shown by the record. Meanwhile, however, Poole-Dean wrote to the Company a proposal in writing dated November 16, 1912, which proposal is Plaintiff's Exhibit "A," found on transcript pages 55 and 56, and is as follows:

“Portland, Oregon, November Sixteenth, 1912.
U. S. Steel Products Co.,
Selling Building,
Portland, Ore.

Gentlemen:

We propose to furnish all necessary labor and equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of EIGHTEEN (\$18.00) DOLLARS per ton of 2000 pounds. Material to be delivered on docks at building sites.

Your very truly,

Poole-Dean Company,

OP/AWH

Per Otho Poole.”

Poole testifies (transcript, page 56) that this proposal was accepted verbally; that Overmire told him “if we get the job you will get it” and that he kept in touch with Overmire right along after that, and some time afterward Overmire said to him: “Well, we have got that job up North.” It does appear that an acceptance of this proposal was made by the Company in its letter, Plaintiff’s Exhibit “G” (transcript, pages 68-69), but in view of what occurred in 1913 and prior to the time that anything was done under the contract it is unimportant whether this proposition of November 16, 1912, was or was not formally accepted. It appears from the evidence of Dean (transcript, page 115)

that he left Portland about the 19th or 20th of November, 1913; that he obtained his employees in Vancouver on his way up (transcript, page 113); that the shop detail plans were sent to their office in Portland by the Company before he left Portland (transcript, page 109). It is shown by Defendant's Exhibit 2, a letter which Poole-Dean wrote and sent to the Company, that before anything was done in pursuance of this contract Poole-Dean wrote a letter (transcript, page 92) as follows:

“Portland, Oregon, November 7th, 1913.
U. S. Steel Products Co., City.
Gentlemen:

In looking through our files we find that we have misplaced copies of our original proposals on the main buildings and wings of the dry dock at Prince Rupert.

It is our understanding we are to erect, rivet and paint two coats on main buildings for \$18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and caulk for \$18.00 per ton of 2000 pounds, all material to be delivered to us on dock at building site.

If the above is in accordance with your understanding we will ask that you confirm same at your earliest convenience in order that our records may be complete. Thanking you in advance, we are

Yours very truly,

Poole-Dean Company,

OP/AWH

Per Otho Poole.”

It is uncontradicted that on November 11, 1913, Poole-Dean received from the Company a letter (transcript, pages 93 and 94) as follows:

"Portland, Oregon, November 11, 1913.

Subject: Prince Rupert Buildings.

Messrs. Poole-Dean Co.,

Portland, Oregon.

Gentlemen:

We have your letter of the 7th instant which states that you have misplaced copies of your original proposal on the buildings and wings of the dry dock on the above subject.

Your understanding is, in accordance with ours, that: you are to haul, erect and rivet the steel for the buildings, for Eighteen Dollars (\$18.00) per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet and caulk the steel work for the wings of the dry dock, for Eighteen Dollars (\$18.00) per net ton of 2000 pounds.

All steel work to be delivered to you on dock at Prince Rupert, B. C.

Very truly yours,

Bridge and Structural Department,

C. C. Overmire,

Contracting Manager.

By Frank E. Fey,

Contracting Agent.

F-C

Cy to W. H. Stratton."

These two letters constitute a proposal and an acceptance, and soon after these letters were exchanged between the parties Poole-Dean began to make arrangements to carry out the contract. These two letters constitute the contract between the parties, the contract upon which every cause of action is based except the cause of action for extra work, amounting to \$400.70.

The rule of law is that when a contract is reduced to writing no parol evidence can be offered or received which shall contradict the writing, but the law conclusively presumes that the writing contains the contract. (17 Cyc., pages 596 and following.) The rule goes even farther than this statement, for it is uniformly held that where the written instrument is free from ambiguity and is in itself susceptible of a clear and sensible construction, parol evidence is not admissible to explain its meaning or to determine the construction of the writing. All that is necessary to show in order to exclude parol evidence of the contract is to show a complete written contract between the parties, a writing of such a nature as to show that it was intended to evidence the agreement between the parties with reference to the subject-matter. It is not necessary that the writing should be in one paper or in any particular form: indeed it is not necessary that the contract should be reduced to writing before it is partly performed, for if reduced to writing after it has been partly performed the parol agreement has been

merged in the written one. This is not simply a rule of evidence, *it is a rule of law.*

So in *Pitcairn v. Hiss*, 125 Fed. Rep. 110, the Circuit Court of Appeals for the third circuit said:

“According to the modern and better view, the rule which prohibits the modification of a written contract by parol is a rule not of evidence but of substantive law.”

The parol evidence in the case cited was admitted without objection, and based upon this evidence instructions were requested by the defendant. These instructions were refused, the trial court saying:

“The contract in suit having been reduced to writing in the shape of written propositions by the plaintiff and written acceptances by the defendant, signed by the parties or their representatives respectively, such written contracts cannot be contradicted or varied by evidence of an oral agreement before or at the time of the execution of the contracts.”

It was claimed that inasmuch as the evidence was before the jury without objection it could not be withdrawn from their consideration, but the Circuit Court of Appeals says, page 114:

“Notwithstanding its admission it was still for the court to declare what as a matter of law

was the contract between the parties, whether it was to be confined to that which was expressed in the writings or could be extended to the verbal assurances alleged to have been given outside of them."

It was the duty of the court, therefore, to construe these several papers and declare from this construction of these several papers what was the contract between the parties and this the court could not submit to the jury for its determination. It will be noted from Defendant's Exhibit 2 that the object of this letter was to "confirm the understanding which Poole-Dean had (of the contract between it and the Company) in order that its records might be complete." In other words, Poole-Dean stated its proposition as it understood it and requested the Company to confirm its understanding. The Company on November 11, 1914, by Defendant's Exhibit 3 (transcript, pp. 93-94) does confirm this, and it was after the receipt of this letter and without any objection to it, that Poole-Dean entered upon the execution of this contract. In the offer of November 16, 1912 (Plaintiff's Exhibit "A"), Poole-Dean proposed to furnish all necessary labor and equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert for \$18.00 per ton of 2000 pounds, material to be delivered at the building sites. In their confirmatory letter of November 7, 1913, Poole-Dean

do not say *steel*, and instead of the word *buildings* speak of main buildings and particularly mentioned dry dock, material to be delivered on dock at building site, and this is confirmed particularly by the Company. The only difference between the acceptance and the proposal and confirmation is, that the acceptance more particularly defines the work to be done, combining the original proposal and confirmatory proposal and more particularly states the place of delivery.

Appellant submits that under the law no parol evidence could be introduced which would tend to vary or contradict these writings. The only parol evidence which could be introduced would be for the purpose of explaining the terms used in the contract. For example, it admits that parol evidence was proper to define the term *buildings* unless the term *buildings* was defined in some other writing referred to in the contract. The appellant contends that the term *buildings* is defined in the specifications, and that the specifications are made a part of this contract.

These writings define the place where the steel is to be delivered as the dock at Prince Rupert, B. C. The evidence shows that there was only one dock at Prince Rupert, B. C., and shows that the material was delivered on this dock. In this there is no controversy. It is possible that the term *steel* for the buildings (the term *structural steel* is used in Exhibit "A," transcript, page 55) might be susceptible of explanation by parol evidence, but this

cannot be the case as the steel is all defined in the specifications.

The four exhibits, "A" (transcript, page 55), "G" (transcript, page 68), 2 (transcript, page 92) and 3 (transcript, page 93) clearly define what each party undertook to do. Under these papers the Company agreed to deliver the steel for the buildings on the dock at Prince Rupert, B. C. It did not undertake to do anything more. It is contended that the steel was to be delivered completely fabricated; but the contract does not so provide. In the absence of any provision in the contract as to the degree of fabrication the presumption will be that the term *steel* or *structural steel* should be construed or taken to mean that the steel should be of such dimensions as the plans and specifications provide. It is conceded that it was fabricated to this extent and to a greater extent, in that many of the parts were riveted. The Company also was to pay for the work which Poole-Dean agreed to do, \$18.00 per ton of 2000 pounds.

Turning now to the obligation on the part of Poole-Dean in proposal Exhibit "A" (transcript, page 55) Poole-Dean offered to furnish all necessary labor and equipment to erect, *riret* and paint the structural steel to be used in buildings and smoke stack. Exhibit "G" does not state anything in regard to this matter. Not content with the situation, with what Poole termed a verbal acceptance of the proposal of November 16, 1912, Poole wrote the letter of November 7, 1913 (transcript, page

92). The object of writing this letter is stated in the letter itself and his understanding of the contract which he claimed was then in force is set forth in this letter. In this letter he mentions the main buildings and wings of the dry dock at Prince Rupert. In this letter he states that "we are to erect, *rivet* and paint two coats on main buildings * * * on wings of dry dock we are to erect, *rivet* and caulk * * * all *material to be delivered to us on dock* at building site." Therefore Poole-Dean contemplated that it should do the *riveting*. Their proposal so states and the letter asking a confirmation of this proposal again so states. As the material was to be delivered on the dock it is clear that from the time of its delivery on the dock whatever was required in order to put it in the buildings according to the plans and specifications was to be done by Poole-Dean, so that taking this proposal by its four corners it is plain that if material came of the dimensions called for by the plans and specifications and was duly delivered the Company fully complied with its contract. The acceptance makes this even more certain. It provides that Poole-Dean is to "*haul, erect and rivet the steel for the buildings, including furnishing and applying two coats of paint as per specifications,*" also to "*haul, erect, rivet and caulk the steel work for the wings of the dry dock.*" There is no ambiguity in regard to what there was to be done, and therefore no parol evidence was proper and the question as to what was the contract sued on was a question for the court

and not for the jury. In this connection note that in the complaint (paragraph III, page 6, again paragraph III, page 9, again paragraph III, page 11, again paragraph III, page 13) Poole-Dean alleged but one contract, the contract made, as stated, about September, 1912. No modification of this contract was alleged. It is this contract which it is seeking to enforce and this contract, prior to doing anything in pursuance thereof, Poole-Dean Company insisted should be reduced to writing and signed by the parties, and this was done.

Therefore the appellant insists that it was error on the part of the trial court in refusing to construe the contract and in refusing to charge the jury as to what was the contract between the parties. This error is inherent in the refusal of the court to give the charge or instruction presented on page 41 of the transcript numbered XI. It is inherent also in the refusal to give the charge found on pages 42 to 44 of the transcript and numbered XII. It is also inherent in the refusal to give the charge requested by the appellant and numbered XIII in the assignments of error, transcript, page 44. It also is inherent in the charge requested by the appellant and found on pages 45 and 46 of the transcript, assignment of error XV. It applies with equal force to the charge requested and refused found on pages 46 and 47, assignment of error numbered XVI. It is also involved in the charge requested and refused found on pages 49 and 50 of the transcript, assignment of error numbered XIX.

The same error taints the charge given by the court found on pages 50 to 52 of the transcript and numbered assignment of error XX. The attention of the court was more particularly directed again to this matter by the application of the defendant for instructed verdicts, assignments of error VI, VII, VIII, IX and X. This is particularly true in regard to assignment of error VIII wherein the court refused to charge the jury to return a verdict for the defendant upon the second cause of action, and in assignment of error numbered IX wherein the court refused to instruct the jury to return a verdict for the defendant upon the third alleged breach of contract and cause of action, and also in the refusal of the court to charge the jury to return a verdict for the defendant upon the fourth alleged breach of contract and cause of action, assignment of error X. Cause of action II alleges a breach on the part of the defendant of the contract in failing to furnish space for assorting and assembling the steel. Under the proposal or proposals and acceptance it is clear that Poole-Dean was to take the steel on the dock and that it was to do everything which was necessary from the time the steel was delivered upon the dock until the steel was erected in place according to the plans and specifications. It was to *haul*, erect and *riret*. There is no complaint that the steel was not delivered upon the dock and there was no obligation contained in the contract that the Company was to secure space on the dock for assorting and assembling the steel. It is not claimed

that the contract was modified after it was made. A proposal in writing even by telegram and an acceptance in writing even by telegram constitute a written contract, and parties are conclusively presumed when once they have reduced their contract to writing to include in the writing all of the contract. Citation of authority upon this proposition might be made but we deem it unnecessary, as the proposition is practically elementary and as the Circuit Court of Appeals has said in the case of *Pitcairn v. Hiss, supra*, this is not a rule of evidence but a rule of substantive law. Whatever was said between the parties before or at the time the contract was so reduced to writing is conclusively merged in the written contract. Whatever was said between the parties after the written contract was executed can only be used for the purpose of showing a modification of the contract, and this is not pleaded or claimed. Again, the third cause of action is for an alleged breach of the contract in that it is claimed that the defendant should not order the plaintiff to begin work on the job until the plaintiff could, when starting, continuously keep at work until the completion of the job. There is not one single syllable in the proposal and acceptance which constitutes the written contract between the parties which tends to show that any agreement of this character was made, and if it was talked of before the contract was entered into or at the time that the contract was entered into as alleged (transcript, page 9) it was not made a part of the contract and

therefore it must be conclusively presumed was not a part of the contract. In so far as the third cause of action is concerned, this also is based upon the same alleged breach and the contract is alleged in practically the same language (transcript, page 11).

The fourth cause of action is also based upon the same alleged contract on behalf of the Company not to order the plaintiff to begin work, etc., and the same reasoning, therefore, will apply with equal force to the error contained in assignment of error numbered X wherein the court refused to direct a verdict for the defendant upon the fourth alleged breach of contract and cause of action.

We submit that this also applies to assignment of error numbered VII, but possibly it is not so clear in regard to this assignment. The defendant requested a directed verdict upon the first cause of action. This cause of action was based upon a claim that the steel was not completely fabricated. It may be that parol evidence was properly admitted to show in what condition as to fabrication the steel should be when delivered. This was the view of the trial court. We have said that the parties to this controversy occupied as between themselves the position of quasi-joint contractors inasmuch as the bid which the Company made to the Railway included furnishing the materials and doing the work which the Company itself was to do, and also furnishing materials and doing the work which Poole-Dean was to do and that the compensation when

paid by the Railway Company was to be divided in such manner that Poole-Dean should receive \$18.00 per ton for its part of the materials furnished and work done, and the Railway Company the balance for materials furnished and work done by it. The plans and specifications were referred to in the correspondence between the parties and are confessedly applicable to the contract between the Railway and the Company. This was recognized by the trial court in its charge (transcript, page 360), and this also was recognized as applicable to what is termed the sub-contract or the contract between the parties to this controversy in the further charge of the court on the same and following page. Possibly, therefore, what is meant by structural steel or steel for the buildings contemplated by this contract may be the subject-matter of inquiry by parol evidence. It was admitted practically by the defendants that the term *steel* (*structural steel*) as used in this contract means that the steel would be fabricated and shipped in the manner customary for this class of work, considering the manner or the means adopted for its transportation. Poole in his letter of September 11, 1914 (transcript, pages 90-91) claims that this bill for \$3330.69 was for work done in the field which it was customary to have done in the shop. In the same letter he states that when he made his proposal he was advised by Mr. Overmire that the material would be fabricated and shipped in the manner customary for this class of work, and he claims that it is customary to ship

material of this character mostly riveted together. What he terms field assembling or riveting he claims is ordinarily done in the shops. The answer of the defendant alleges (transcript, page 20) that the understanding was that the steel should be delivered by water transportation and should be delivered as completely fabricated as it was the defendant's custom to ship by water transportation similar steel for similar work, and that the steel was fabricated to this extent. Possibly, therefore, under the issues made by the pleadings parol evidence as to the degree of fabrication of steel intended for work of this character may have been proper, and therefore it may be that the court was warranted in not directing a verdict for the defendant upon this cause of action.

But this, while possibly true as to the first cause of action, cannot be claimed to be true as to the second, third or fourth causes of action, for the second cause of action is based upon the alleged breach of a parol contract which if made is conclusively presumed to have been included in the written contract, and the third cause of action in like manner is based upon a like claim, and so with the fourth cause of action. Upon this alleged contract no parol evidence was admissible. In this connection it seemingly is claimed, and upon this claim some reliance seems to have been placed by the trial court, that these matters were discussed between Overmire and Poole after Poole-Dean entered upon the contract, and that these matters were discussed between these

parties at and before the contract was reduced to writing. Poole claims that he told Overmire that he would hold his company responsible for these damages. He alleges in his complaint that Overmire agreed that the Company would pay it, but that is not the contract upon which he is suing, and if these statements were made they cannot affect the rights of the parties. As said in the case of *Pitcairn v. Hiss, supra*, what passed between these parties should be "regarded as mere assurances of the intention and ability to please, much as the salesman commends without warranting the excellence of his wares."

THE PLEADINGS.

In this connection your Honors' attention is called to the issues presented by the pleadings. From the amended complaint (transcript, pages 5 and following, paragraph III) it is seen that the first cause of action is based upon the contract under which Poole-Dean agrees to furnish the labor and equipment and to erect, rivet and paint the structural steel to be used in the machine shop, boiler shop, power house and other buildings of the Grand Trunk Pacific at Prince Rupert, B. C., such steel to be delivered by the Company upon the premises of the Grand Trunk Pacific at Prince Rupert, B. C. It is further alleged that the steel should be delivered completely fabricated at the factory, and that if extra work was necessary other than the erection of the steel the plaintiff would be

allowed a reasonable amount for such extra work. It will be noted that nothing is said in the proposal and acceptance as to the extent to which the steel should be fabricated, and nothing is said in regard to extra work or to payment for such extra work. In the first cause of action Poole-Dean does not complain that the steel was not delivered where it should be under the contract; does not complain of any delays, but only complains of extra work required to erect the steel because the steel was not, as it claims, completely fabricated. But this complaint does not apply to the steel for the dry dock, but to the steel for the machine shop, boiler shop, cold storage building, power house and foundry building (paragraph VI, p. 7). The question before the court then was not whether the steel was delivered when and where it should be delivered, but whether when delivered it was in the form in which it should have been delivered, and *this question is confined entirely to the steel for these buildings, cold storage, ship shed, blacksmith, machine and boiler shop, power house and foundry building, and has nothing to do with the steel for the dry dock, which it is admitted was delivered completely fabricated.*

The second cause of action (transcript, pages 8 and following) is for damages for delays due to the fact that the pontoons for the dry dock were not delivered at the time that the work upon the other buildings was completed. *It is admitted that*

the steel was delivered in time. It is claimed that it was understood and agreed that the plaintiff should not be ordered to begin work on the job until such time as plaintiff could, when starting the building, continuously keep at work until the completion of the job, and that defendant would reimburse the plaintiff for any delays if there were any delays. Turning to the proposal and acceptance, it will be seen that there is no mention made of delays, no mention made of the time when Poole-Dean should be ordered to go to work, no provision in regard to furnishing the pontoons, and nothing indeed which bears at all upon this cause of action. This cause of action is based entirely upon delays resulting from the failure of the Grand Trunk Pacific to furnish the pontoons at the time when Poole-Dean expected them to be furnished. It is admitted by Mr. Poole (transcript, page 101) that "*the only delay for which he sought to recover was the delay in building the dry dock*" and, on page 85, that he "*understood that the Railway were to build the pontoons themselves*" and not the Company, and that the Railway and not the Company was to furnish the pontoons for the dry dock and, on page 87, that he "*found out about the pontoons by examining the specifications.*" The proposal and acceptance do not state anything about the pontoons but do refer to the specifications. The specifications provide that the pontoons should be furnished by the Railway, not by the Company. The proposal and acceptance do not contain anything in

regard to when the work was to be begun and when completed. *This is governed by the specifications.* The proposal and acceptance contain no provision for delays caused by the failure of the Railway to do its part of the work, and the Railway, it is conceded, had to build the foundations for all the buildings before the erection of the steel could begin, and had to build the pontoons for the dry dock before the steel wings of the dry dock could be erected. *None of these obligations rested upon the Company,—they were all obligations of the Railway.*

The third cause of action (transcript, pages 10 and following) is not really a separate cause of action at all. It is really a part of the second cause of action, merely another element of damage. In the so-called second cause of action the damages are for the enforced idleness of the plant. In the so-called third cause of action the damages are for the transportation of men to and from Vancouver, men whom Poole-Dean had provided for the purpose of doing the work on the wings of the dry dock, but the cause of being unable to employ these men is identical with the cause of the idleness of the plant. These two causes of action, which are really one, have nothing whatever to do with any of the buildings, but relate only to the dry dock. The breach which caused the delay was the breach on the part of the Railway Company. That this was an obligation of the Railway Company and not of

the defendant company is shown by the specifications.

The fourth cause of action is for the *expense of assorting and handling the structural steel for the dry dock*, not for the other buildings. It is claimed in this cause of action that the Company should furnish Poole-Dean with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Company (transcript, page 14). The alleged breach on the part of the Company is that it failed to provide such adequate space for this purpose. The proposal and acceptance provide where the steel shall be delivered, but make no mention of space. It is conceded that the steel was delivered at the place agreed on.

The fifth cause of action is for extra work. This, therefore, does not rest upon the contract in writing at all and will be discussed by itself.

The specifications do not state when the work should begin. There was no written contract between the Company and the Railway. The specifications, however, do request bidders to state the time required for the fabrication and delivery of the material at Prince Rupert, the time required to erect the wings on the first section of three pontoons, the time required to erect the wings on the second section of six pontoons and the time required to erect the wings on the third section of

three pontoons (transcript, page 210). The specifications also request similar information in regard to the ship building shed, the power station and other buildings. Attention is also called to the provisions of the specifications (transcript, pages 224-5), which requires the contractor (Poole-Dean Company in this case) to have at all times sufficient number of men on the work who shall act promptly in conjunction with the workmen of all of the contractors in order that there may be no delay in the erection and completion of the work, and to the provision on pages 205-6 in regard to the time when the wings of the dry dock should be erected.

THE EVIDENCE.

We are of the opinion that what we have said in regard to the contract is really a sufficient presentation of the issues in this case, but under the rules of the court we deem it our duty to more particularly apply the evidence to the issues, keeping in mind always the contract between the parties. In this matter we shall discuss the several causes of action in their order, but shall not attempt to reproduce at length the evidence contained in the record.

CAUSE OF ACTION No. I.

The first cause of action is based upon the theory that the contract between the parties required the Company to deliver the steel completely fabricated, and the contention is that the steel was not so fabri-

cated inasmuch as many parts which Poole-Dean expected to be riveted together came "knocked down." The allegation of the complaint is (transcript, page 7) that the understanding was that the steel for the buildings should be delivered completely fabricated, and that if extra work was necessary other than for the erection of said steel, plaintiff would be allowed a reasonable amount for such extra work. This allegation is in conflict with the terms of the written contract inasmuch as the written contract required Poole-Dean not only to erect but also to haul and *rivet* the steel (Defendant's Exhibits 2 and 3, transcript, pages 92 and 93). This leads us to consider Defendant's Exhibit 1, the subject-matter of assignment of error I (transcript, page 37). This exhibit (transcript, pages 90-91) is a letter from Poole-Dean to the Company dated September 11, 1914, in which Poole-Dean forwards bills for extra field work amounting to \$3330.69, due (as stated) to being compelled to perform work in the field which it is customary to have done in the shop. In this letter Poole-Dean claims that when it made its proposal it was advised by Overmire that all the "material would be fabricated and shipped in the manner customary for this class of work," not that the steel should come or be delivered completely fabricated. It is not claimed in this letter that Overmire promised that the steel should be completely fabricated. The clear intent of this letter is that Overmire represented that the material would be fabricated and shipped in the

manner customary for this class of work. Poole-Dean, therefore, must either rely upon the contract alleged in the complaint, that the steel should be delivered completely fabricated, or it must rely upon the representations made by Overmire, that the material would be fabricated in the manner customary for this class of work. Under the allegations of the complaint this letter would be incompetent as it does not tend to sustain the allegations of the complaint but tends to contradict such allegations. In this letter Poole-Dean says, "our proposal was to erect, *rivet* and paint this work, which proposal was accepted by you." There was no mention of any field assembling or riveting which is ordinarily done in the shops. This confirms the view which we took of this contract, and the word "*rivet*" clearly must have some significance. The word "*erect*" doubtless would embrace such construction as was necessary to put the materials together substantially and in the manner provided by the plans and specifications. To erect a stone building, for example, would certainly include the use of mortar or cement, as the specifications might provide for holding the stone in place, and the word "*erect*" would unquestionably include the *riveting* which the specifications showed was necessary to hold the parts of the building together. The word "*rivet*," therefore, has some other significance in this connection, and the only significance which could be given to it is that it meant that whatever the specifications showed was necessary in the way

of riveting should be done by Poole-Dean. It will be noted, furthermore, that in this same letter there is no pretense that Overmire agreed that he would pay for this. The claim is that Poole-Dean stated that it would do the work, keep accurate charge of it and bill the Company for it as soon as it was completed.

Assignments of error VI and VII also relate to this cause of action, though VI relates to all of the causes of action. Assignment of error XII also relates to this cause of action as well as to the other causes of action. Assignment of error XIV relates entirely to this cause of action and so does assignment of error XV. The Company contended upon the trial that the steel was fabricated in the manner in which such steel is ordinarily fabricated for work of this character when shipment is made by water. It contended that this was all that Mr. Overmire said to Poole in regard to the matter, and it contends that inasmuch as the District Court refused to construe the writings passing between the parties (Exhibits "A," 1, 2 and 3) and to charge the jury that these papers comprised the entire contract the court should have submitted to the jury not only the Company's construction of the contract but also the Company's contention as to the extent to which the steel should be fabricated, and that all the evidence in regard to a promise on the part of the Company made by Overmire that the steel should be completely fabricated was in-

competent as in conflict with the written terms of the contract set forth in the letters of Poole-Dean itself. We have said that there may be some question in regard to the meaning of the terms "structural steel" and "steel," and that possibly parol evidence might have been used to show what these terms meant, and in connection therewith this letter might have been introduced. We do not believe this is the law, but as the ruling of the court in regard to the written contract was upon the trial in the District Court the law of the case the defendant had a right to show what was meant by these terms. In this connection your Honors' attention is called to the charge of the court (transcript, pages 361-2) wherein, after reading to the letter of November 7, 1913, and the letter of November 11, 1913, Exhibits 2 and 3 (transcript, pages 92 and 93), the court states that "these letters are a part of the contract but do not include the whole contract which it is alleged the parties entered into between themselves. If the court should so conclude it would be the duty of the court to construe the contract and not for you." Now these letters clearly are complete in so far as they go and they show what the "proposals" were, what the "understanding" was, and they therefore must be construed to include the entire contract, but if they do not they certainly show that Poole-Dean was to *erect* and *erect* the material and that the material was to be delivered to Poole-Dean on the dock at the building site.

CAUSES OF ACTION No. II and No. III.

The second cause of action alleges the same contract which the first cause of action alleges. The difference is that in the first cause of action the allegation is that the steel shall be delivered completely fabricated and in the second cause of action that it was understood and agreed that the defendant would not order plaintiff to begin work on the job until such time as the plaintiff could, when starting the building, continuously keep at the work until the completion of the job, and that in the event there were any delays in said work the defendant would reimburse the plaintiff for such delays. This second cause of action is for damages for the enforced idleness of the equipment of Poole-Dean owing to delays caused by the failure of the Railway to furnish the pontoons.

In the third cause of action the complaint states exactly the same contract, and the only difference is that the damages claimed are for moneys expended in railway expenses and wages of men returned to Vancouver and back to the work.

It will be seen that Exhibits 2 and 3 say nothing in regard to this matter. It is admitted by Poole-Dean (transcript, page 100) that the only delay was the delay in building the dry dock. It is admitted by him that he learned that the Railway should furnish the pontoons from the specifications (transcript, page 87) and, on page 88, *that he heard the*

specifications read. The specifications do not say when the work shall be commenced or when it shall be completed. The specifications (transcript, pages 205-6) do provide that the time of the erection of the material for the dry dock (and these two causes of action relate only to the dry dock) is to commence when the three first pontoons have been delivered, that the additional three pontoons will be delivered after the erection of the wings on the first three pontoons has been completed, and so on, and declare particularly that the pontoons will be turned over by the pontoon contractors. We have said that the instrument, Exhibit 2, was intended to show what was Poole-Dean's proposal and what was Poole-Dean's understanding, and was intended to state all of the proposal made by Poole-Dean on the main buildings and the wings of the dry dock and all of its understanding with the Company regarding what it was to do upon these buildings, and that the purpose of this letter was "to have its understanding confirmed so that Poole-Dean's records might be complete." In like manner the answer of the Company on November 11th refers to the letter of the 7th and confirms the understanding of Poole-Dean in regard thereto. It would seem, therefore, that there can be no question that these two instruments contained all of the understanding had between the parties in regard to this work, and there is no question that the proposal was intended to show all that Poole-Dean were to do and to indicate all that the Company was to do

upon this joint enterprise. The assignments of error relating to this matter are numbered V (transcript, page 38), VI (transcript, page 39), VIII and IX (transcript, page 40) and XII (transcript, page 42), XIII (transcript, page 44), XV (transcript, page 45), XIX (transcript, page 49) and XX (transcript, page 50). In connection with this matter your Honors' attention is called to Exhibit "G" (transcript, page 68) wherein the Company advises Poole-Dean when shipments would probably be made and when completed and when the material would probably arrive, and to Plaintiff's Exhibit "H" (transcript, page 70) containing like information and warning the plaintiff to "get in touch with Mr. Pillsbury to ascertain the condition of the site and the anticipated progress," and to Defendant's Exhibit 4 (transcript, page 102), and to Defendant's Exhibit 5 (transcript, page 103), and Defendant's Exhibit 6 (transcript, page 105), and to Plaintiff's Exhibit "M" (transcript, page 106). These instruments and the evidence of Poole above referred to clearly show that Poole understood that this work should not begin until the Railway Company or the pontoon contractors had complied with its or their part of the job and furnished the pontoons in the way called for by the specifications. It will be also noticed that on the 10th of November, 1915, according to Plaintiff's Exhibit "I" (transcript, page 75) in which Poole-Dean makes complaint of the extra expense of handling and rehandling the steel for the other

buildings no complaint is made that there was any unexpected delay in regard to furnishing the pontoons. On the contrary, seemingly Poole-Dean claimed credit for "rushing the work upon the other buildings so as to finish the same five weeks ahead of time," thus, according to Poole's own statement, anticipating the completion of the work upon the other buildings and causing the very delay and the very damages of which Poole-Dean now complains. It must be borne in mind that the delays complained of relate only to the dry dock. Five weeks of this delay, according to Poole's own statement, was caused by himself in that he "employed extra men to rush the job upon the other buildings and finish those buildings five weeks ahead of time." Here in the language of Mr. Poole himself and when he was in a complaining mood, he shows that more than half of this alleged delay was caused by his own unwarranted action, and yet he seeks to hold the defendant liable for the loss sustained by reason thereof, and in this same letter in which he is complaining of unfair treatment on the part of the Company he does not even refer to any claim for damages on account of this alleged delay. This whole matter is evidently trumped up. Upon its face it shows that more than half of the damage was caused by the folly of Poole-Dean in rushing to finish work five weeks before the time contemplated for the same.

CAUSE OF ACTION No. IV.

This cause of action is based also upon the alleged contract, stated in practically the same language in which the contract is alleged in the preceding causes of action. The damages are predicated upon this contract, but the particular allegation upon which the same are based is that it was understood and agreed that the defendant would furnish the plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Company (transcript, page 14). This cause of action is covered by assignments I, II, III, IV, V, VI, IX, X, XII, XVI and XX. Assignment I relates to Exhibit "I" (transcript, page 75). From this exhibit it seems that in submitting a bid Poole-Dean included in its estimate the estimated cost of assorting and handling. Assignment II relates to Exhibit "L" (transcript, page 82), but what reference this has to assorting and handling we have failed to understand. There seems to have been some question between the parties whether the material should be received at the ship's tackles or whether the term "on the dock" meant that the materials should be landed on the dock and received when landed. *There is no question, however, between the parties that the material was delivered as agreed*, and if Poole-Dean was entitled to any extra pay for receiving material at the ship's tackles this unquestionably has been settled and adjusted

between the parties. Assignment III relates to a question propounded to the witness Dean, in which he was asked whether in submitting its bid Poole-Dean did not include a charge for handling and assorting the steel and if so what sum was included in this estimate. Assignment IV also refers to this estimate included in the proposal. If Poole-Dean is entitled to anything on account of this item it is not what he estimated it would cost but what was the reasonable expense of the same. We shall not dwell upon this question for it seems axiomatic that if Poole-Dean was to *haul and erect the steel* which was to be *delivered* to it *on the dock* then Poole-Dean assumed every contingency which was incident to the hauling of the steel from the place of delivery to the place where it should be erected in the buildings. Yet the word "haul" is used in the acceptance of the proposal, or rather in the letter confirming the understanding which Poole-Dean had of its own proposal and the place of delivery, is particularly mentioned both in the letter of Poole-Dean of November 7th and in the letter of confirmation from the Company of November 11th. Whether these letters embrace the entire contract or not these letters unquestionably do embrace the place of the delivery of the steel and the hauling of the steel, and this unquestionably must include the sorting and handling of the steel. If anything was said by Overmire it would only be a representation of what he understood would be the conditions, but as Poole was present at the time that all the repre-

sentations were made and as he knew the representations made by the Railway and knew the sources of Overmire's knowledge, he cannot predicate any claim against the Company on this account.

CAUSE OF ACTION No. V.

This cause of action rests upon a new contract and the assignments of error relating to this matter are numbered VI, XII, XVII and XVIII.

The only other cause of action is the matter of \$400.70, admitted to be for the work not contemplated by the contract between the parties. This was extra work not mentioned in the specifications or plans and for which the Railway receiving the benefit must pay. It matters not whether the work was done under the direction of the defendant or under the direction of the Railway Company. It was primarily done under the direction of the Railway and could not be done otherwise. This is conceded. Poole-Dean Company undertook to hold the defendant for these bills. The defendant claimed that Poole-Dean Company should charge these sums to the Railway. It is conceded that this work was not embraced in the original contract. Poole testifies (page 78) that he had an understanding with Overmire that when any work of this kind should come up the plaintiff should go ahead and do it and it should be threshed out afterwards. That he billed the defendant for this work and afterward agreed to bill this work to the Grand Trunk

but in doing so would not release the defendant, but when the defendant paid him he would turn the money over to the defendant. Dean testifies (pages 127-128) that this was extra work not called for by the contract, that when this work was started the defendant had no representative on the ground and that the first of the work done was done under orders from Pillsbury and not under orders from the defendant. Pillsbury in his deposition attaches copies of the bills rendered to the Grand Trunk Pacific Railway for this work. The bills show that the work was done by Poole-Dean Company, contractors, that the bill was for extra work and the same was made out directly to the Grand Trunk Pacific Railway. He testifies (page 183) that they were approved and forwarded by him to the Railway for payment, that it was customary to pay estimates for the Poole-Dean Company on account of labor involved in extra work on bills in favor of Poole-Dean, not of the defendant. The letter transmitting these bills to Donnelly is also found attached to the deposition of Pillsbury.

Defendant contends:

1. That this work was done not for the defendant but for the Railway and that the custom which prevailed, as testified to by Mr. Pillsbury, clearly shows this fact as well as the bills themselves which were transmitted by Pillsbury.

2. That even if the defendant be liable to the

plaintiff the Railway was primarily liable either to the plaintiff or to the defendant.

3. That if the plaintiff, at the defendant's request, billed this claim directly to the Railway this constituted an assignment to the plaintiff of all defendant's claim against the Railway for this work, and the acceptance of this claim by the Railway when so presented by the plaintiff was an acceptance of the assignment.

4. That it is immaterial whether the plaintiff agreed to release the defendant from this claim or not, for if the defendant were liable it is admitted that the Railway Company was liable originally to the defendant for the same and the presentment of the claim in the name of the plaintiff to the Railway, its acceptance and allowance by the Railway placed the plaintiff in any event in the position of a pledgee or mortgagee of this claim, or as the holder of this claim as collateral security, and the plaintiff thereby incurred the obligation of using due diligence to collect it.

5. That when the claim was allowed by the Railway Company in favor of the plaintiff the Railway Company thereby was discharged from any liability therefor to the defendant.

6. That when the Railway gave plaintiff credit for the amount of this claim on the indebtedness of the plaintiff to the Railway, admitted to be in excess of the amount of this claim, this action on

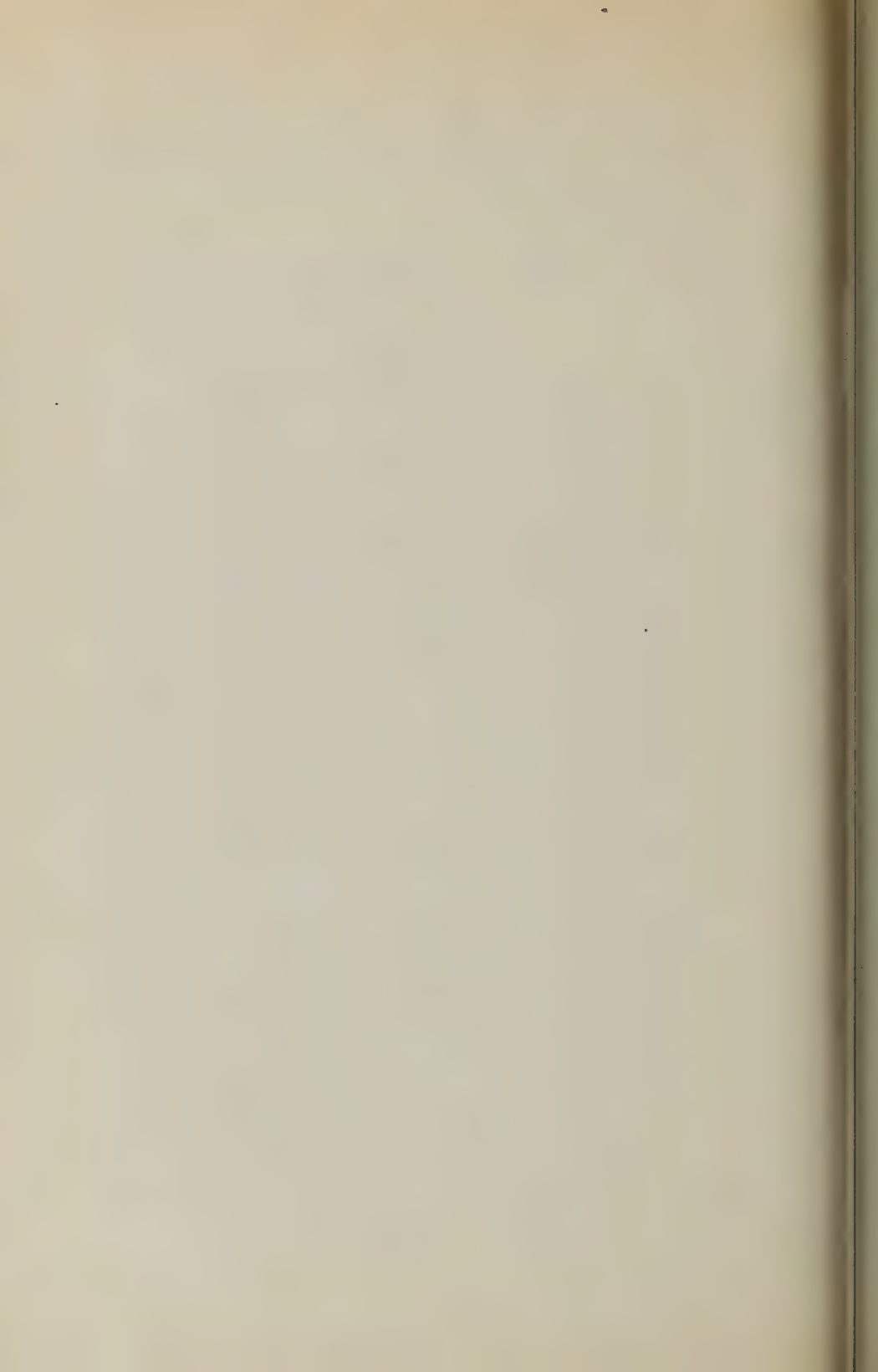
the part of the Railway Company constituted a payment of the claim and the application of the proceeds thereof to the plaintiff's credit, so that the plaintiff has received so much money for this claim, and by reason thereof the defendant is absolved from any liability for the same.

Whatever be the effect of these proceedings it must be conceded that the presentation of the claim to the Railway Company by the plaintiff in its own name constituted a claim against the Railway Company for the amount. It must be conceded that when the claim was allowed by the Railway Company the Railway Company thereby became indebted to the plaintiff under any circumstances for the amount of this claim. Especially is this true as it appears from the evidence that claims of this character were usually presented directly to the Railway Company by the plaintiff. The allowance of the claim, therefore, and the crediting of the same upon the indebtedness of the plaintiff to the Railway Company constituted a payment. Unquestionably the effect of these proceedings is to destroy any claim which the defendant might have against the Railway Company for the amount of these bills, and under such circumstances the plaintiff should be compelled to give credit to the defendant for such amount as so much money paid.

The plaintiff in error respectfully submits that there was error as alleged and that this cause should be reversed.

Respectfully submitted,

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No. 2936

(2)

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES STEEL PRODUCTS
COMPANY, a Corporation,

Plaintiff in Error,

vs.

POOLE-DEAN COMPANY, a Corpora-
tion,

Defendant in Error.

Brief on Writ of Error for Defendant in Error

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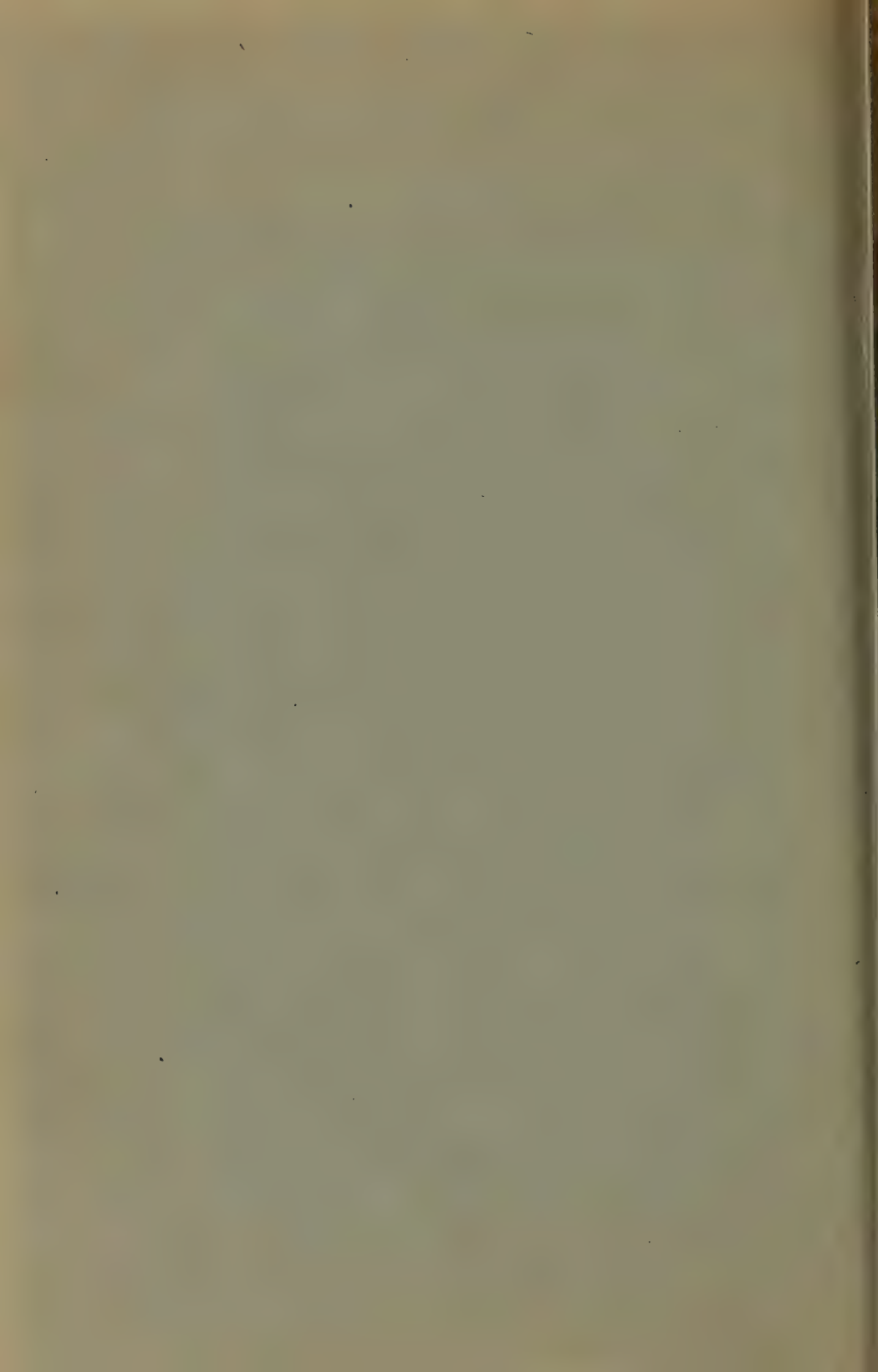
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Clerk.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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COMPANY, a Corporation,

Plaintiff in Error,

vs.

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tion,

Defendant in Error.

Brief on Writ of Error for Defendant in Error

STATEMENT.

In order that respondent's position may be clearly set forth, the following statement is made.

This is an action upon a sub-contract, wherein the Poole-Dean Company, hereinafter referred to as the respondent, and the United States Steel Products Company, hereinafter referred to as the appellant, were the parties. The appellant obtained from the Grand Trunk Pacific Railway Company, some time in the late fall

of 1912, a request for furnishing and erecting steel to be used in the railroad terminal buildings and a floating dry dock at Prince Rupert, British Columbia. This contract was awarded appellant. Appellant not being entitled to operate in Canada, was compelled to sub-let the erecting of the steel. The appellant, before obtaining the contract from the Railroad Company, had its representative, Mr. Overmire, get into communication with Mr. Poole, the respondent Company's representative, and these two men made the sub-contract upon which this action is predicated. That this contract might be understood, Mr. Overmire and Mr. Poole went to Prince Rupert, B. C., to look over the site of the proposed work. At Prince Rupert they met Mr. Pillsbury, the resident engineer of the Grand Trunk Pacific Railway Company, and Mr. Pillsbury at that time agreed that if the appellant received the contract for the furnishing and erecting of the steel that it would be given sufficient space in which to properly sort and assemble the steel entering into the construction of the terminals, and also that the undertaking would be so planned that when appellant was instructed to begin furnishing and erecting the steel, it could continuously operate until the completion of the work, it being contemplated both by Mr. Pillsbury and Mr. Overmire that considerable space would be necessary for the proper carrying on of this work and that as Prince Rupert, at that time was a small village, many miles from the labor markets, it would necessitate the importing of labor by the appellant from the labor centers of British Columbia at a material expense. Mr. Overmire, upon reaching this understanding with Mr. Pillsbury, in turn, informed Mr. Poole substantially to

the same effect and agreed to furnish the respondent with adequate space for the sorting and assembling of the steel to be erected by the respondent and to only instruct respondent to begin work when respondent could continually keep at the work and thereby obviate the necessity of shutting down, tying up equipment and the likelihood of transporting labor back and forth several times from Vancouver and other labor centers to Prince Rupert. At this time there was an examination of the engineer's plans and a discussion as to the method by which the appellant would ship the steel from its mills to the work site. It was agreed that the steel would be completely fabricated at the shops of appellant. Then Mr. Poole and Mr. Overmire returned to Portland, and on their return Mr. Poole made up a price of \$18.00 per ton which was to be paid for the erecting of the steel. At numerous times Mr. Poole made requests upon Mr. Overmire that the understanding which they had come to at Prince Rupert with reference to fabrication, space and the commencement of the work, be reduced to writing, but the requests were at all times evaded, with the result that there was never any part of the understanding reduced to writing except that \$18.00 per ton should be charged for the erecting, riveting and painting of the structural steel. (See Pl. Ex. "A," Tr. p. 55; Pl. Ex. "G," Tr. p. 68; Def. Ex. 2, Tr. p. 92; and Def. Ex. 3, Tr. p. 93.) The substance of these letters is substantially as follows:

(Plaintiff's Exhibit "A"—respondent to appellant, November 16th, 1912.)

"We propose to furnish all necessary labor and

equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of Eighteen (\$18.00) Dollars per ton of 2000 pounds. Material to be delivered on docks at building sites."

(Plaintiff's Exhibit "G"—appellant to respondent, March 24th, 1913.)

"Referring to your conversation with our Mr. Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection.

As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert.

Our formal contract with you for the erection will be drawn up as soon as conditions permit."

(Defendant's Exhibit 2—respondent to appellant, November 7th, 1913.)

"In looking through our files we find that we have misplaced copies of our ORIGINAL PRO-

POSALS on the main building and wings of the dry dock at Prince Rupert.

It is our understanding we are to erect, rivet and paint two coats on main buildings for \$18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and caulk for \$18.00 per ton of 2000, pounds all material to be delivered to us on dock at building site.

If the above is in accordance with your understanding we will ask that you confirm same at your earliest convenience in order that our records may be complete."

(Defendant's Exhibit 3—appellant to respondent, November 11th, 1913.)

"We have your letter of the 7th instant which states that you have misplaced copies of your ORIGINAL PROPOSAL on the buildings and wings of the dry dock on the above subject.

Your understanding is, in accordance with ours that: you are to HAUL, erect and rivet the steel for the buildings, for Eighteen Dollars (\$18.00) per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to HAUL, erect, rivet and caulk the steel work for the wings of the dry dock, for Eighteen Dollars (\$18.00) per net ton of 2000 pounds.

All steel work to be delivered to you on dock at Prince Rupert, B. C."

From Plaintiff's Exhibit "A" it will be noted that the price of \$18.00 per ton is mentioned for the erecting, riveting and painting of the steel used in the buildings and smoke stack. Plaintiff's Exhibit "G" shows that Messrs. Poole and Overmire apparently had a conversation and came to some sort of a verbal contract covering the erection of the Grand Trunk Pacific buildings at Prince Rupert, and that in addition to the \$18.00 per ton, that some sort of an agreement had been reached as to the deliveries, and it clearly shows from the following language:

"Our formal contract with you for the erection will be drawn up as soon as conditions permit."
that there were still matters pending and unfinished upon which an agreement was necessary. This is more clearly shown by Defendant's Exhibit 2 (Tr., p. 92) in which Poole-Dean Company requests that for the completion of their files they be furnished with the ORIGINAL proposal on the main buildings and WINGS OF THE DRY DOCK at Prince Rupert. It is in this letter that the first mention is made of the dry dock and this letter also mentions that there is caulking to be done in addition to erecting and riveting work on the dry dock.

Then referring to Defendant's Exhibit 3 (Record, p. 93), the appellant replies and adds to its reply a new feature. In other words, in addition to erecting, riveting and caulking the steel work for the dry dock, the word HAUL is injected.

About a week after this last letter (Defendant's Exhibit 3, Tr., p. 93) was received by the respondent, the respondent was notified by the appellant that the first consignment of steel was about to be unloaded at the terminals at Prince Rupert and to be there with workmen to receive the same. Mr. Dean, of the respondent company, had been selected to oversee the work at the building site and about the 19th of November, in company with Mr. Poole, went to Mr. Overmire's office and complained that the detail sheets, which were then seen for the first time, showed that the steel for the buildings at Prince Rupert was going to arrive incompletely fabricated, necessitating extensive shop work at the building site. Mr. Overmire replied that whatever the condition of the steel appeared to be it made no difference inasmuch as the matter would be taken care of by the appellant in accordance with appellant's and respondent's agreement that the steel would be completely fabricated, and that the appellant had anticipated this and taken the condition of the steel into consideration in submitting its general bid for the furnishing and erecting of the steel to the Grand Pacific Railway Company, and Overmire agreed to pay for the additional fabricating.

Mr. Dean, upon arriving at Prince Rupert, obtained his employes at Vancouver, B. C., and proceeded to work, keeping an exact record of the cost of the shop-work that it was necessary to do at the building site in erecting the buildings, and a claim was thereupon made against the appellant for the sum of \$3330.69. This included the extra work on the steel entering into the

construction of the cold storage building, ship shed, blacksmith, machine and boiler shop, power house and foundry buildings. As the work progressed it developed that owing to the fact that the appellant had given the respondent premature instructions as to when to begin work at Prince Rupert, that the respondent was going to complete its work on the erection of the buildings before the erection work upon the pontoons for the floating dry dock would be ready, and that there would be a resultant tying up of the respondent's equipment and laying off of workmen for a period of several weeks, all in violation of the appellant's contract with the respondent. This occurrence resulted in a claim for \$918.00 covering the expense of laying off the workmen, and \$215.00, representing approximately 6% per year on the value of the equipment tied up during the delay.

When work was resumed December 1st, 1914, on the pontoons of the floating drydock it was apparent that the appellant had violated its agreement with the respondent wherein it agreed to furnish the respondent with sufficient space for the purpose of sorting and assembling the steel to be used in the floating dry dock, with the result that it became necessary for the respondent to handle and rehandle the steel, an accurate account of the cost of which was kept by the respondent, and a claim of \$2459.00 made.

In addition to the above amounts the appellant ordered \$400.70 worth of extra work. It is admitted by the appellant that this work was extra and was not contemplated by the appellant and respondent in their con-

tract, but appellant claims this amount should have been charged direct to the Grand Trunk Pacific Railway Company and not to the appellant.

So that the claims of the respondent are:

(1) That it is entitled to \$3330.69 for shop work done in the field by it on the building steel and not originally contemplated in respondent's agreement with the appellant. This shop work does not include steel for the pontoons.

(2) That it is entitled to \$918.00 and \$215.00 in being prevented from continuously performing the work, in violation of the agreement with the appellant.

(3) That it is entitled to \$2459.00 covering extra handling of the structural steel used in the erection of the wings of the floating dry dock, due to appellant's breach of agreement in failing to furnish adequate sorting space. This excludes extra handling of the steel for the buildings.

(4) That it is entitled to \$400.70 for extra work.

It is essential to keep in mind throughout the consideration of this case that the respondent is a sub-contractor of the appellant, and it is so admitted in Paragraph III of Respondent's Answer (Tr., p. 19), and that the respondent had no contractual relations whatever with the Grand Trunk Pacific Railway Company. In fact, throughout the work the respondent herein did not know whether the Grand Trunk Pacific Company or the Grand Trunk Pacific Development Company were the parties with whom the appellant had its contract.

The question at issue therefore is, What was the contract entered into between the appellant and the respondent? It is appellant's contention that the letters heretofore mentioned and the specifications comprised the entire contract as concluded, while it is the respondent's contention, and it was the theory of the trial court, that the letters in question are but a part of the contract and do not include the whole contract, that it was alleged and proved the parties entered into, and that therefore the trial court was justified in leaving to the determination of the jury what the contract in reality was.

ARGUMENT.

This action is based upon contract and the principal disagreement between appellant and respondent is as to whether or not the trial court, in holding that the contract was not completely contained in certain letters, and specifications, erred in leaving to the jury, as a mixed question of fact and law what the real contract was. The contract was made by Otho Poole, representative of the respondent company, and C. C. Overmire, representative of appellant company, and it is from the testimony and subsequent conduct and admissions on the part of the appellant that the real agreement between the parties hereto is arrived at. It is clearly shown by the testimony that in the fall of 1912, Overmire and Poole contemplated that this work was coming up and made a trip to Prince Rupert, B. C., for the purpose of intelligently understanding the proposed work. At that time the appellant had not obtained any contract from

the Grand Trunk Pacific Railway Company, but like the respondent, was endeavoring to ascertain the situation and the approximate cost of the work. The contract for the furnishing and erecting of the steel, as far as the Grand Trunk Railway was concerned, was let in one contract to one contractor, namely, the appellant, and the appellant, because of inability to operate in the Province of British Columbia, contemplated sub-letting the erection of the steel. Mr. Overmire therefore saw Mr. Pillsbury, the railway company's representative at Prince Rupert, and was assured that there would be adequate space for the proper sorting and assembling of the steel which was to be erected, and the question of deliveries was also gone into, so that the work could, after it was once started, be continuously carried on. It must be borne in mind that Prince Rupert was a small, isolated village; that idle equipment could not be utilized elsewhere during a shut-down, and that mechanics necessary for the erection of the structural steel would all have to be returned to and transported from Vancouver, B. C., and other labor centers of Canada.

After the contract for the furnishing and erecting of the steel was obtained by the appellant the respondent was thereupon given the sub-contract for the erection of the steel, in accordance with the agreement made by Mr. Overmire. The parties, therefore, are to be considered as contractor and sub-contractor; such was the understanding disclosed by the testimony and also from the pleadings of the appellant itself.

Clearly the entire contract was not embraced in

writings, as is so strenuously urged by appellant, for the letters themselves are incomplete and mere memoranda leading up to and forming but a part of the larger contract. Plaintiff's Exhibit "A" (Tr., p. 55) is as follows:

"We propose to furnish all necessary labor and equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of Eighteen (\$18.00) Dollars per ton of 2000 pounds. Material to be delivered on docks at building sites."

The next writing in connection with this contract is Plaintiff's Exhibit "G" (Tr., p. 68) which is as follows:

"Referring to your conversation with our Mr. Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific Buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection.

As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert.

Our formal contract with you for the erection will be drawn up as soon as conditions permit.

Trusting this letter will give you the necessary authority for making your arrangements for your part of the work, we remain."

Then comes Defendant's Exhibit 2 (Tr., p. 92) as follows:

"In looking through our files we find that we have misplaced copies of our ORIGINAL proposals on the main building and WINGS OF THE DRY DOCK at Prince Rupert.

It is our understanding we are to erect, rivet and paint two coats on main buildings for \$18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and caulk for \$18.00 per ton of 2000 pounds, all material to be delivered to us on dock at building site.

If the above is in accordance with your understanding we will ask that you confirm same at your earliest convenience in order that our records may be complete."

Then follows Defendant's Exhibit 3 (Tr., p. 93), which is as follows:

"We have your letter of the 7th inst. which states that you have misplaced copies of your ORIGINAL proposal on the buildings and wings of the dry dock on the above subject.

Your understanding is, in accordance with ours that: you are to HAUL, erect and rivet the steel

for the buildings, for Eighteen Dollars (\$18.00) per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet and caulk the steel work for the wings of the dry dock, for Eighteen Dollars (\$18.00) per net ton of 2000 pounds.

All steel work to be delivered to you on dock at Prince Rupert, B. C.”

It will be noted from Exhibit “A” that merely the furnishing of labor and equipment necessary to erect, rivet and paint the structural steel to be used in the buildings and smoke stack at \$18.00 per ton of 2000 pounds, was required, material to be delivered at the building sites. The testimony is that in addition to the first letter there was oral conversation and that the \$18.00 per ton feature of the letter was accepted and that figure used by Mr. Overmire (Tr., p. 56). In fact, there is testimony of Mr. Overmire to the effect that there were two sets of specifications, for the witness Overmire testified “that the original specifications provided that between the pontoon and where the caisson sets down on the pontoon, there was to be canvas belting, with tar; that Poole’s written bid did not mention that point; that as a matter of fact Poole’s first bid covered painting of all the buildings, and the dry dock
* * * (Tr., p. 325).

There is no letter in evidence showing that Poole made more than one bid, but there is Overmire’s testimony that there was more than one bid.

The next letter, under date of March 24, 1913 (Plaintiff's Exhibit "G," Tr., p. 68) refers to the conversation relative to the contract and states that the figure of \$18.00 was used by the appellant in basing its bid to the railway company for the erecting of the steel. The question of deliveries is also gone into in this letter and it is then stated that the formal contract for the erection will be drawn as soon as conditions permit, inferentially showing that the agreement was not wholly within the writings.

The next letter in point of time is Defendant's Exhibit 2 (Tr., p. 92), which is simply a letter from the respondent asking for copies of the ORIGINAL proposals on the main buildings and DRY DOCKS. It is in this letter that the dry dock is first mentioned, as the other two letters simply mentioned the terminal buildings.

The next letter in point of time is Defendant's Exhibit 3 (Tr., p. 93), in which the appellant acknowledged receipt of inquiry of respondent for copies of the ORIGINAL proposals for the files, and confirms the letter of inquiry written by the respondent, and in addition to riveting the steel for the buildings it is stated that the respondent is to HAUL. So that in none of these letters are the same terms used, but in each case there is either an addition to the original letter, or the letter is modified. Besides this, the testimony shows that appellant herein must have made more than one proposal to the Grand Trunk Pacific Railway Company for the furnishing and erecting of the structural street (Overmire's testimony, Tr., p. 296).

Upon the appellant's theory of this case, these four letters, together with the specifications, would comprise the entire contract, but it is submitted that the trial court was correct in holding that, as a matter of law, it could not conclude that these four letters and the specifications comprised the entire contract, because the letters themselves are not complete and show that they are but a small part of a larger transaction which is embraced in the oral agreement, and in addition to this, the witness, Overmire (Tr., p. 324, et seq.) stated that the specifications, so far as appellant and respondent sub-contractor were concerned, were not followed, in that

(1) Specifications required work to begin on dry dock wings when three pontoons were floated, but it was agreed and respondent began work when two pontoons were floated;

(2) Specifications required appellant to have a representative continuously on the work, but appellant had no representative on the work continuously;

(3) Specifications required a certain steel smoke stack, but it was agreed by appellant and respondent that the material to be used should be concrete;

(4) Specifications required a large, certain sized air compressor, but appellant and respondent agreed to a smaller size and the respondent used a smaller sized air compressor than required by the specifications;

(5) Specifications required an English patent paint, but appellant and respondent agreed upon a dif-

ferent paint and respondent did not paint the steel with the specified patented English paint;

(6) Specifications required respondent to furnish canvas belting with tar on pontoon caisson, but appellant and respondent agreed this was not to be in the contract, and respondent did not furnish canvas belting with tar on the pontoon caissons;

(7) Specifications required respondent to furnish ballast for pontoons, but appellant and respondent agreed not to furnish ballast, and respondent did not furnish ballast for the pontoons;

(8) Specifications required respondent to test pontoons upon their completion, but appellant and respondent agreed not to test pontoons, and the respondent did not test the pontoons upon their completion.

The testimony shows clearly that the contention of the respondent that the contract here was oral and that there was an agreement between it and the appellant with reference to the furnishing of space at the building site at Prince Rupert and with reference to the time at which the work was to begin is correct, for not only does Mr. Poole testify to this effect, but that there was such an understanding is clear from the fact that Mr. Overmire, in letters to appellant company, informed the company that such was the agreement and therefore it is reasonable to believe that in as much as the appellant did have an agreement with the Grand Trunk Pacific Railway Company, it in turn did make such an agreement with the respondent herein. Mr. Overmire

says in his letter to the appellant company, dated May 29, 1914 (Plaintiff's Exhibit "V," Tr., p. 311) in referring to a conversation had between Mr. Overmire and Mr. Donnelly at Seattle:

"I stated to him (Donnelly) the promises which were made to me by Mr. Pillsbury as to how we could expect to find the site when the steel should arrive."

Also, in another letter from Mr. Overmire to the appellant (Plaintiff's Exhibit "X," Tr., p. 316) the following language is used:

"I, at that time, took up with Mr. Pillsbury the capacity of the dock, in order that I might satisfy myself that all of the construction would be heavy enough to permit of the storage of the material as unloaded from the ships.

In this connection, I asked that our bid contain a clause that the owners were to supply fill roadways or trestles to the various building sites."

(See, also, Plaintiff's Exhibit "W," Tr. 312.)

Mr. Overmire also wrote a letter to appellant under date of March 6, 1914 (Plaintiff's Exhibit "T," Tr., p. 303) in which this language is used:

"Our bid was based upon information by Mr. Pillsbury that the docks would be completed and could be used for unloading and storing material. Because of the fact that we could not store the material on the dock it could not be sorted as unloaded."

The foregoing letters deal principally with the question of space. There was, however, an understanding between the appellant and the Grand Trunk Pacific Railway Company, and it is reasonable to believe therefore that this same understanding was embodied by the appellant in its sub-contract with the respondent, for Mr. Overmire writes to the head office of the appellant company at New York under date of July 20th, 1914 (Plaintiff's Exhibit "U," Tr., p. 308) :

"Mr. Poole is going to be put under considerable expense laying off crews and having his equipment tied up at Prince Rupert for the next six months, and as this is due wholly to non-deliverance of the substructures in proper condition to begin erection, I think it would be in order to notify the Railroad Co. that we shall expect an extra covering the cost of idle equipment and transportation of men because of the enforced layoff."

Mr. Overmire also writes, under date of January 13th, 1914 (Plaintiff's Exhibit "S," Tr., p. 298) :

"I have to advise that I have had several talks with Mr. Poole during the last few days regarding the difficulties that he is encountering at Prince Rupert and which are accounted for because of failure of the Railway Company to provide facilities and do certain work in accordance with their promises to us when we were at Prince Rupert on this work."

It will be seen, therefore, from the foregoing, that no court as a matter of law could properly hold that

the four letters comprising Plaintiff's Exhibits "A" and "G," and Defendant's Exhibits 2 and 3, together with the specifications, were the contract entered into between the appellant and respondent herein. Especially is this true when it is shown that the letters are incomplete in themselves and form but a part of the larger transaction which constituted the contract, and when it is further shown by letters and by testimony of the respondent witnesses that it was agreed that the specifications be not complied with in many respects.

It is, of course, a rule settled beyond controversy that parole contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract, but this rule does not apply in cases where a part only of the contract was reduced to writing.

*American Bridge & Contract Co. v. Bullen
Bridge Co., 29 Ore. 549; s. c. 46 Pac. 138
(Ore.)*

This same rule of law is recognized by the federal courts. The Supreme Court in the case of *Rankin v. Fidelity Ins. Trust & Savings Deposit Co.*, 23 Sup. Ct. Rep. 553, in discussing this question say:

"Although the construcion of written instruments is one for the court; where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury."

“(Citing) *Brown v. M’Gran*, 14 Peters 479.

And in the case just cited it was said by Mr. Justice Story:

“There certainly are cases in which, from the different senses of the words used or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects, and intentions, and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed.”

THE PLEADINGS.

The claim of the respondent in this action is set forth in five separate causes of action.

Cause of Action I.

This covers the claim for extra shop work done in the field because of the failure of the appellant to have the steel delivered properly fabricated as agreed. The appellant admits that this question was one properly referable to the jury. (See Appellant’s Brief, p. 44.) This claim is confined exclusively to the steel used in the buildings and does not include the steel used for the pontoons of the floating dry dock, which steel arrived in the condition agreed upon. This distinction is clearly pointed out by the court in its instructions to the jury. (See, particularly, Tr., p. 363, 2nd Par.)

Cause of Action II.

This cause of action covers damage to the plaintiff occasioned by the tying up of respondent's equipment from September 1st, 1914, to November 5th, 1914. It was sought in this cause of action to recover the reasonable rental, but the court held that the damages in this case would be limited to 6% on the valuation of the equipment for the time it was idle. This phase of the case was also clearly covered by the court in its instructions. (Tr., p. 370, Pars. 2 and 3.)

Cause of Action III.

The third cause of action is for the loss suffered by the respondent in making it necessary to tie up its equipment from September 1st to November 5th, 1914, and representing the expense in returning the laborers to their homes upon the shutting down of the work and bringing them back upon the commencement of the work again. This, too, was clearly pointed out by the court in its instructions. (Tr., p. 371.)

Cause of Action IV.

The fourth cause of action covers extra sorting and handling of the steel for the dry dock. This does not include the extra handling of steel for the other buildings. This, too, was clearly covered by the court in its instructions to the jury. (See Tr., p. 372.)

Cause of Action V.

While the last cause of action is for extra work ordered by the appellant and for which the respondent

seeks to hold the appellant. The court also fairly presented this phase of the controversy to the jury. (See Tr., p. 373.)

The appellant seeks to confine the contract to the four letters comprised in Plaintiff's Exhibits "A" and "G" and Defendant's Exhibits 2 and 3, and the specifications, and thereby to defeat four of these five causes of action. But the Answer of the defendant is inconsistent in its contention in this, that paragraphs VII and VIII provide (Tr., p. 20) :

VII.

"It was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made upon the express understanding, that defendant should deliver said steel to plaintiff by water transportation, and that said steel should be delivered as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work.

VIII.

"Defendant delivered all the steel required by plaintiff under plaintiff's said contract with defendant on dock at Prince Rupert, British Columbia, as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work, and defendant in all respects ful-

filled and completed its obligations towards plaintiff under defendant's contract with plaintiff."

By these two allegations the appellant admits that there was an understanding outside of the written letters to the effect that the steel should be shipped to respondent by water transportation and that the steel should be delivered as completely fabricated as was "defendant's custom to ship by water transportation similar steel for similar work." It might occur to one that there is an implication that the steel would be shipped as was customary under similar circumstances, but appellant goes further and alleges that there was a specific agreement, which must have been oral, that the steel should be delivered as completely fabricated as it was "defendant's custom" to fabricate; so that the very allegation of appellant's answer go to show that the contract upon which the respondent brings this action is a contract made up partially of writings and partially of oral agreements and that the trial court, therefore, did not err in leaving the entire matter under proper instructions to the jury.

THE EVIDENCE.

The appellant's first, third and fourth specifications of error relate to evidence and it is claimed that the witness Poole and the witness Dean should not have been allowed to testify as to the estimated cost of the handling of the steel and the real cost of the extra handling of the steel for the reason that it was contrary to the written contract and an improper way of proving damages.

The first objection, of course, goes to the merits of the controversy in this case and as to whether or not the entire contract was in writing, or whether it consisted of letters and conversations and has been discussed heretofore.

As to the second objection that it is an improper way of proving damages, the respondent respectfully submits that both witnesses, in addition to testifying that the estimate of \$.90 for handling and sorting the steel for the dry dock was the basis for their bid, also went further and testified, upon being qualified as experts, that under the circumstances 90c per ton was a reasonable and just charge for handling and sorting steel under similar circumstances. That a charge of \$2.28 for sorting steel for work under similar circumstances was \$1.38 more than what a reasonable charge under the circumstances really should be; so that the testimony was, therefore, clearly admissible upon that showing and also admissible upon the theory upon which this case was tried by the trial court, namely, that the contract was composed of letters and oral understandings combined.

As to the second and fifth specifications of error, namely, the admissibility of plaintiff's letter dated December 2nd, 1913, known as Plaintiff's Exhibit "L," and also Exhibits "S," "T," "U," "V," "W" and "X," the rule is well known that where a contract was not originally in writing, and the terms of the oral agreement were imperfect and indefinite, the real contract must be largely inferred, as a question of fact, from the subsequent course of dealing.

Whale v. Gatch, 70 Pac. 832 (Ore. 1902).

Specifications of error, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XIX, XX, are, many of them, repetitions and all are based upon the false assumption that the entire contract in this controversy was in writing. As to that part of the specifications dealing with the requested instructions to the court, those that are consistent with the correct theory of this case were either given literally or substantially by the court in the court's instructions to the jury.

Specifications of error XVII and XVIII deal with extra work. It is submitted that the court's instructions covering this item of extra work were correct. The contract was oral, and it was for the jury to determine what the contract and the liability thereunder really was.

With reference to that part of the appellant's brief being a criticism of causes of action No. II and No. III, and contained on page 58, a statement is made that Mr. Poole rushed the work on the buildings and thereby was able to finish them up five weeks ahead of the schedule time, and is, therefore, claiming that more than half of the alleged delay for which he claims compensation was caused by finishing the buildings five weeks ahead of time. Appellant has misread the testimony in this respect, for the testimony was to the effect that it was not the buildings that were finished five weeks ahead of time, and then a consequent delay in waiting for the pontoons. The testimony shows that no extra crews were employed upon the buildings but that after the work on the pontoons was begun, extra employees

were employed upon the pontoons, the work was rushed and the pontoons were completed five weeks ahead of time. (Fey's testimony, Tr., pp. 341, 342, Par. 2, 346; See also, Poole's letter, Plaintiff's Exhibit "I," Tr., p. 75.)

SUMMARY.

It will be seen, therefore, that appellant received the contract for the furnishing and erecting of the steel upon this work on presumably a low margin as to profit, because of the keen competition on the part of the Canadian Steel Companies, fortified by a protective tariff, and that, therefore, the real purpose of the appellant, from the beginning of the contract here in question, has been to foist upon the respondent, losses which should properly be assumed by the appellant. The testimony clearly shows, in relation to the first cause of action, that certain promises and agreements were made by the appellant with reference to the degree of fabrication of the steel entering into the construction of the buildings; that the appellant apparently found that it would be more profitable for them to breach this agreement, because by shipping the steel incompletely fabricated a material saving could be effected upon the freight, due to the method of computing the same upon a basis of space rather than weight. By this practice the appellant, therefore, attempted, at the expense of the respondent, and was able to effect a material saving.

With reference to the second and third causes of action, it would seem from the testimony that the appellant at the time of entering into the contract with the

Grand Trunk Pacific Railway Co. had clearly anticipated just such contingencies as did occur, namely, an inability to proceed continuously with the work, necessitating shutting down, with the consequent losses.

And in the fourth cause of action it would also seem that the appellant realized the vital necessity of adequate space for the assembling of the dry dock material. And in each of the contingencies alluded to protected themselves by an agreement with the Grand Trunk Pacific Railway Company, so that they could present claims to the Railway Company in the event of the contingencies taking place. For some reason, however, unknown to the respondent, the appellant has not deemed it advisable to come to an issue with the Grand Trunk Pacific Railway Company regarding these claims, but rather, it would seem, prefers to compel this respondent to litigate this matter to enforce payment of respondent's claims.

And in the fifth cause of action the testimony is clear, and it is admitted by both parties, that the work for which payment is sought was extra work, but this work was done at the request of appellant upon a promise of the appellant to pay, and the testimony is clear that any claims presented to the Railway Company were presented to the Railway Company at the request of the appellant, on behalf of the appellant, and for the accommodation of the appellant. And why the appellant as to this claim, as well as to all of the other claims, should expect the respondent in this case to present the respective claims to the Grand Trunk Pacific Railway

Company, with whom it had no contract, full well knowing that it would be necessary to litigate the claims with the Grand Trunk Pacific Railway Company, is beyond comprehension.

It must at all times be remembered that the appellant here was the contractor with the respondent; that the respondent was fearful that disagreements might arise as to what the contract was; was fearful of just such a result as has occurred, and at numerous times had requested that the appellant give it a written contract; and that the appellant, although it made the promise to give a written contract, never fulfilled the promise.

It is, therefore, respectfully submitted that, under the pleadings in this case, the testimony adduced, and considering all the surrounding circumstances, the trial court was correct in its theory of the case and under proper instructions submitted the same to the jury and that the resultant verdict of \$7,000 under the law and evidence in the case is correct.

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